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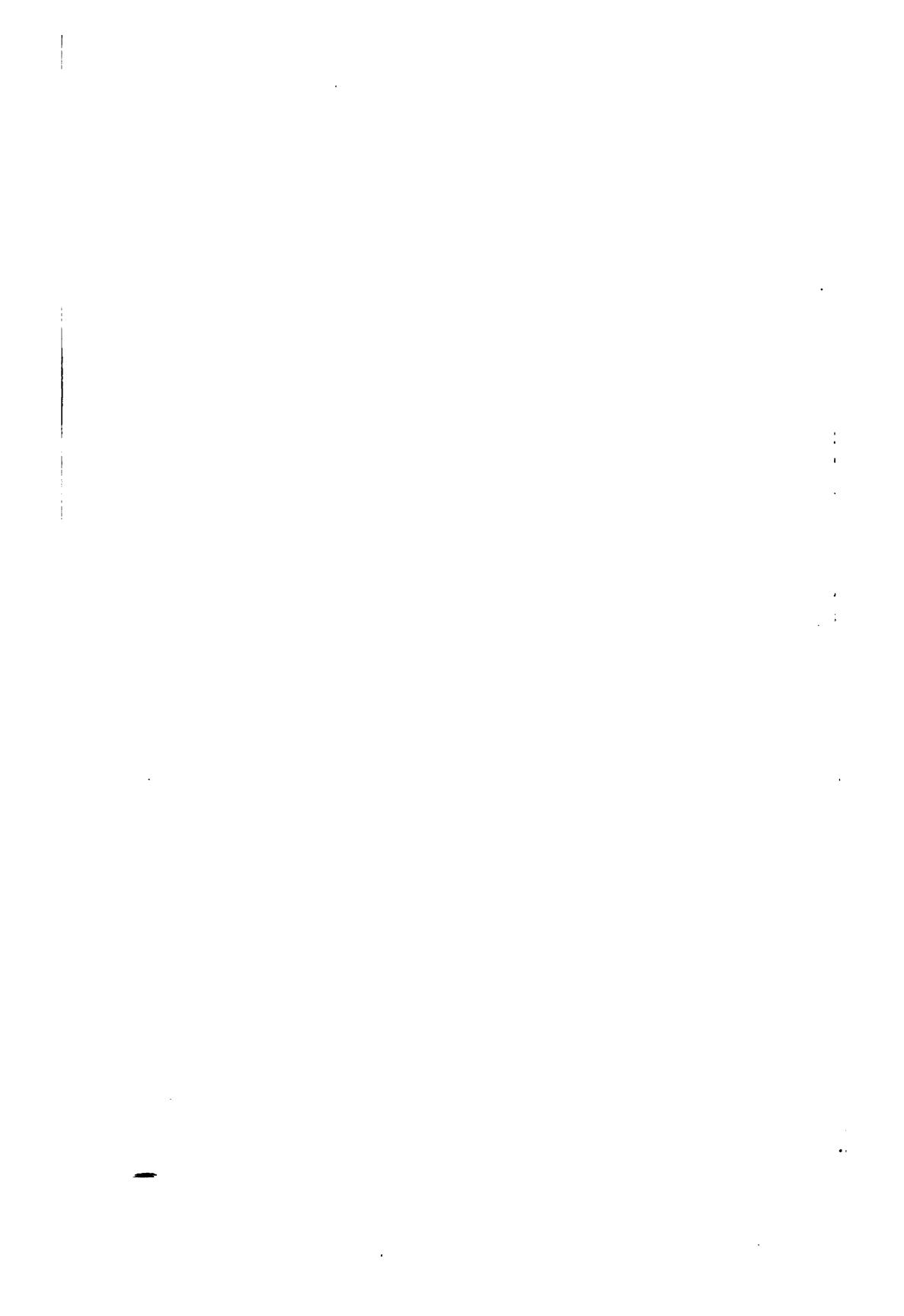
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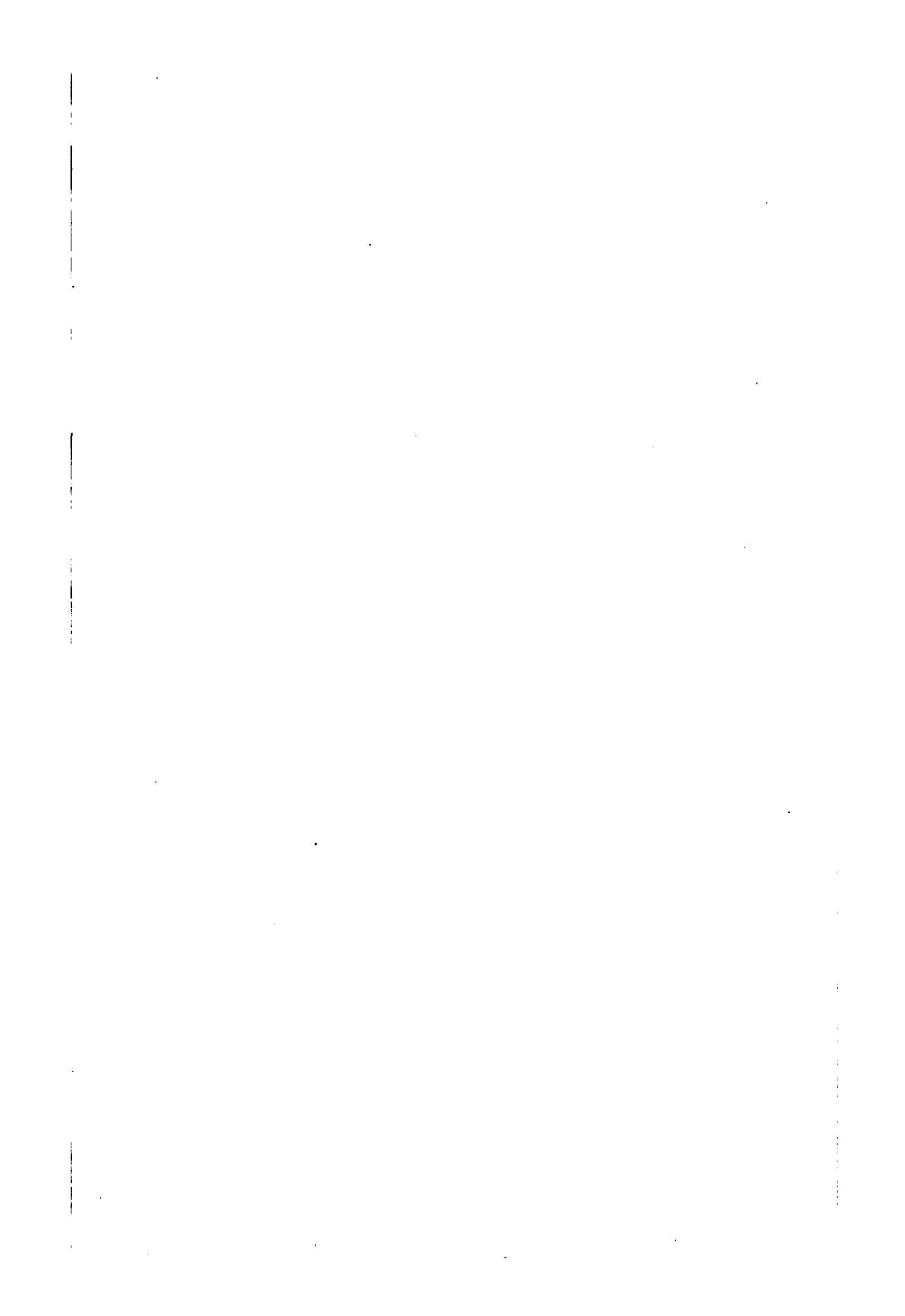
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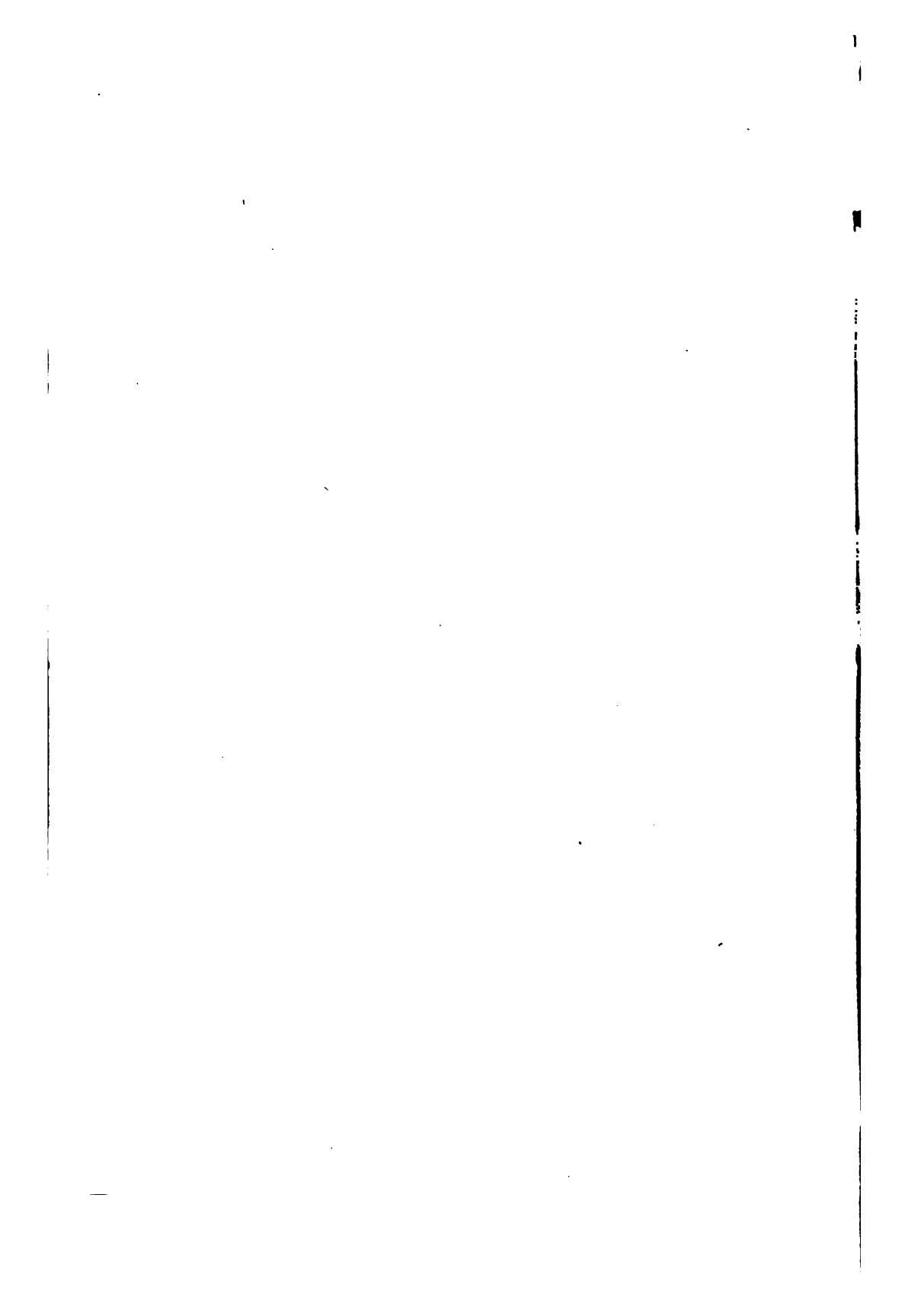
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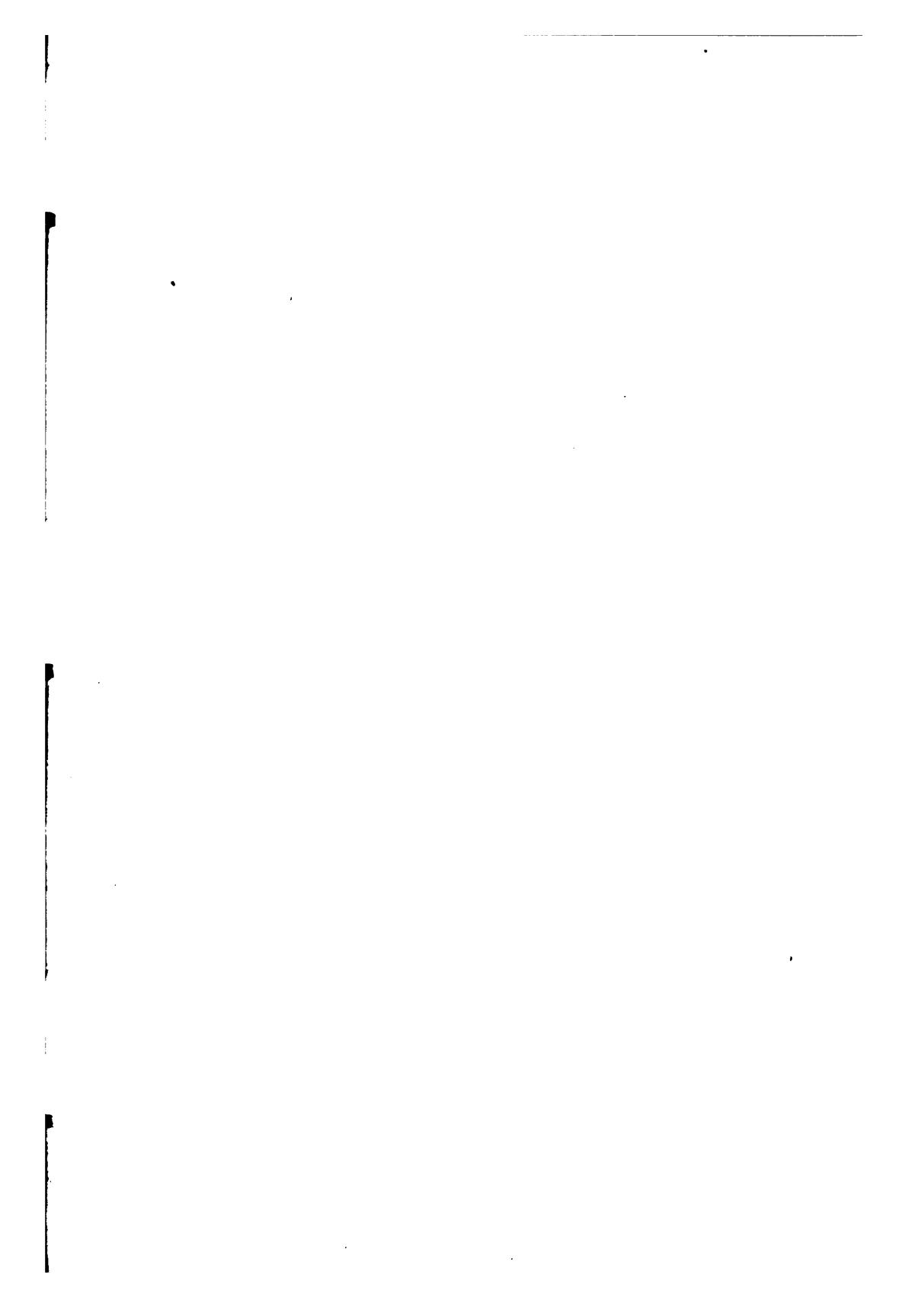


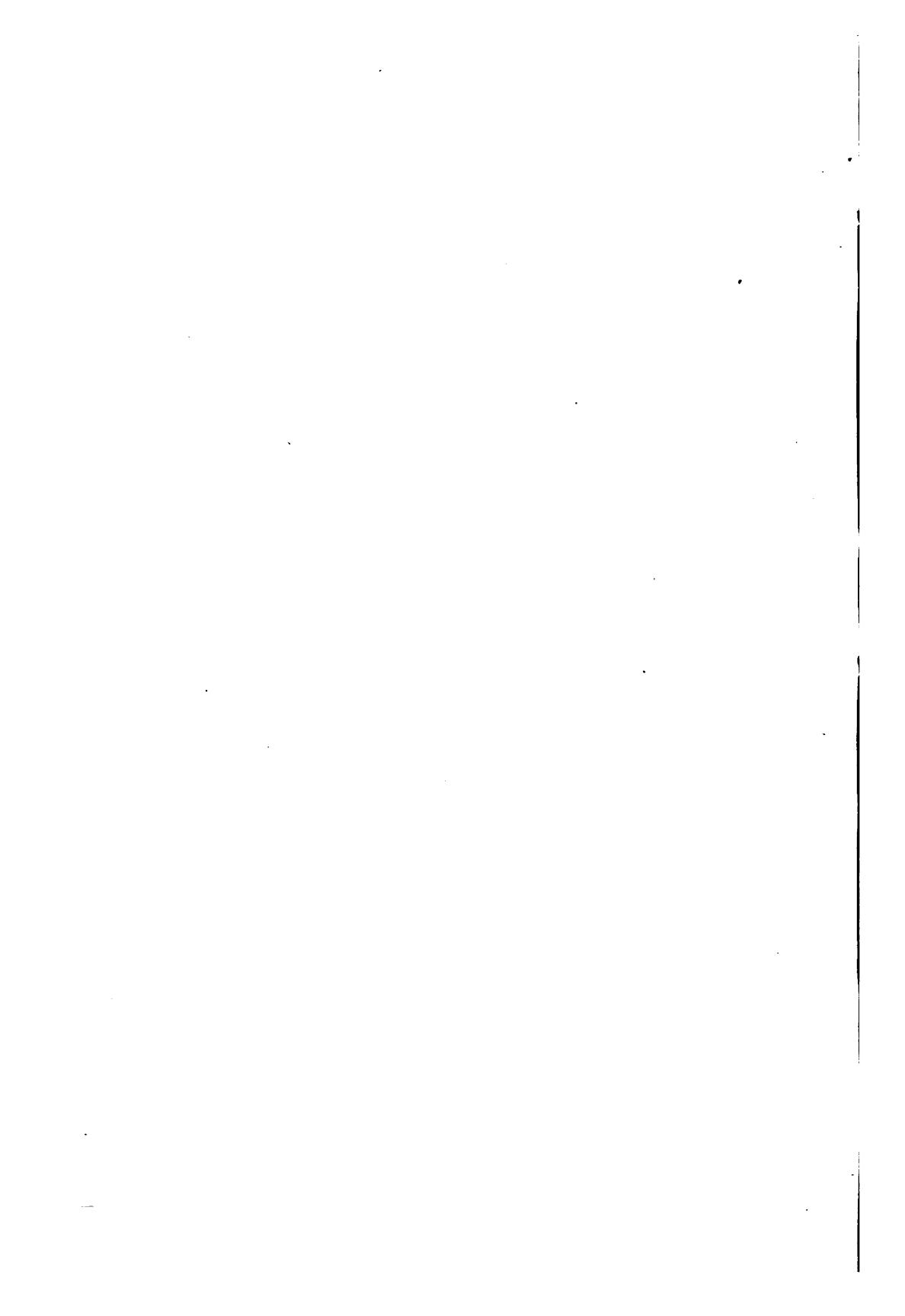
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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

S U P R E M E C O U R T

OF THE

U N I T E D S T A T E S,

IN FEBRUARY TERM, 1810.

BY WILLIAM CRANCH,

CHIEF JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Potius ignoratio juris litigiosa est, quam scientia.
CIC. DE LEGIBUS, DEAL. 1.

VOL. VI.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FRÉDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING CO.

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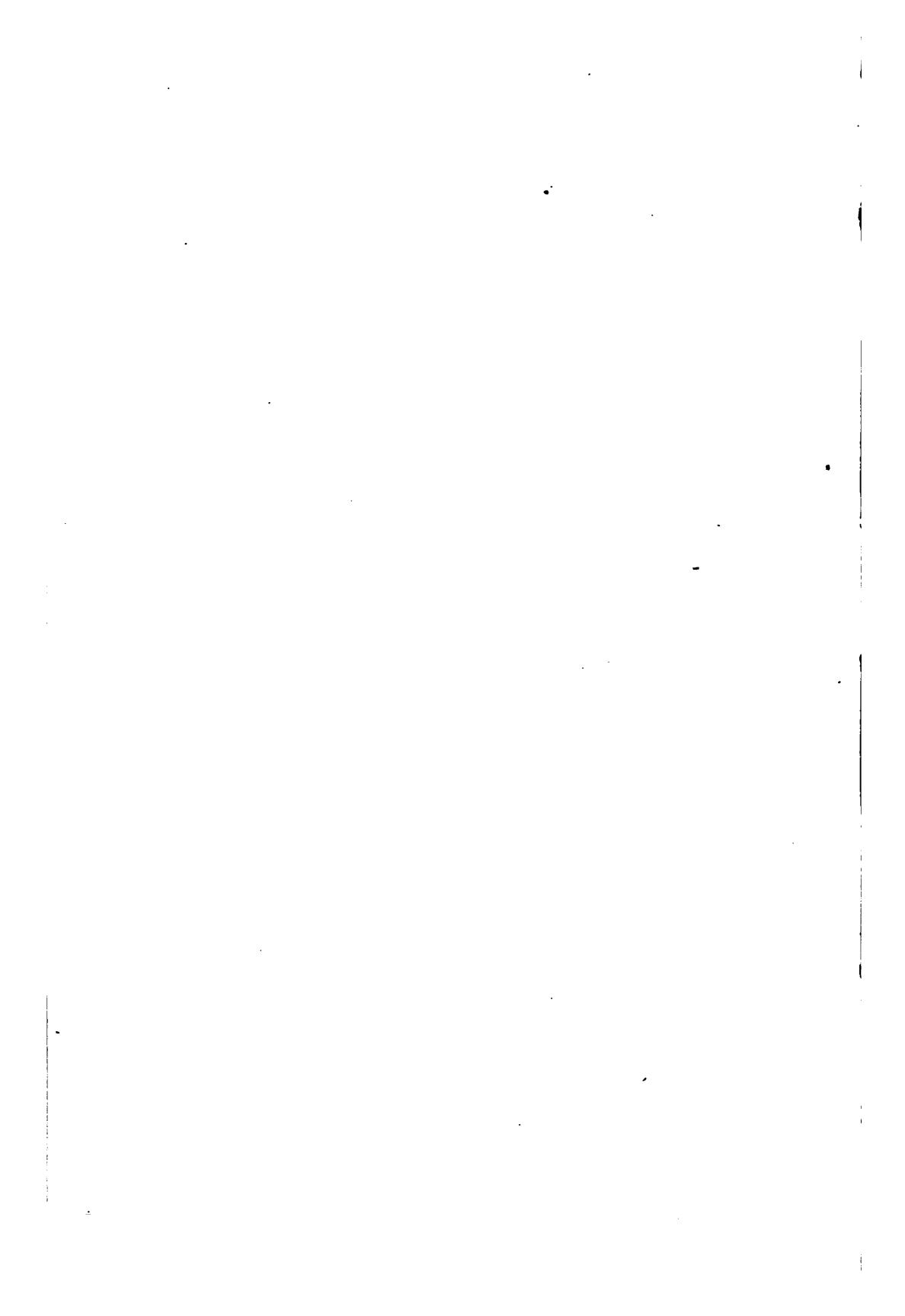
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JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES,
PRESENT AT THE FEBRUARY TERM, 1810.

Hon. JOHN MARSHALL,	Chief Justice.
" BUSHROD WASHINGTON,	Associate Justices.
" WILLIAM JOHNSON,	
" BROCKHOLST LIVINGSTON,	
" THOMAS TODD.	

Judges CUSHING and CHASE were prevented from attending by ill health.



A TABLE
OF THE
NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

A	*PAGE	F	*PAGE
Alligator The, <i>v.</i> United States		327	
Amiable Lucy, The, <i>v.</i> United States.....	330	Finley <i>v.</i> Lynn.....	238
Anderson, Stewart <i>v.</i>	203	Fletcher <i>v.</i> Peck.....	87
Atkinson <i>v.</i> Mutual Assurance Society.....	202		
B		G	
Bacon, Debutts <i>v.</i>	252	Georgetown and Alexandria Turnpike Co., Custiss <i>v.</i>	238
Ben, Negro, Scott <i>v.</i>	3	Gordon, Campbell <i>v.</i>	176
Brent, Kennedy <i>v.</i>	187	Grundy, Young <i>v.</i>	51
C		Guestier, Hudson <i>v.</i>	281
Campbell <i>v.</i> Gordon.....	176		
Chesapeake Ins. Co. <i>v.</i> Stark... ..	268	H	
Craig's Adm'r, McKnight <i>v.</i>	183	Hall, United States <i>v.</i>	171
Custiss <i>v.</i> Georgetown and Alexandria Turnpike Co.	233	Harwood, Lewis <i>v.</i>	82
D		Helen, The, United States <i>v.</i>	203
Debutts <i>v.</i> Bacon.....	252	Hodgson, Maryland Ins. Co. <i>v.</i> ..	206
Delaware Ins. Co., King <i>v.</i>	71	Holland, Field <i>v.</i>	8
Durousseau <i>v.</i> United States... ..	307	Hudson <i>v.</i> Guestier.....	281
E		J	
Ex parte Wilson.....	52	Juliana, The, <i>v.</i> United States..	327
K		K	
		Kennedy <i>v.</i> Brent.....	187
		King <i>v.</i> Delaware Ins. Co.....	71
		Korn <i>v.</i> Mutual Assurance Society.....	192

L	*PAGE		*PAGE
Lee, Lodge's Lessee v.....	237	Ruden's Ad'mr, Maryland Ins.	
Lewis v. Harwood.....	82	Co. v.....	338
Livingston v. Maryland Ins. Co. 274			
Lodge's Lessee v. Lee.....	237		
Lynn, Finley v.....	238		
M			
Mandeville, Riddle v.....	86	Scott v. Negro Ben.....	3
Mandeville, Sheehy v.....	253	Sere v. Pitot.....	332
Maryland Ins. Co. v. Hodgson... 206		Sheehy v. Mandeville.....	253
Maryland Ins. Co., Livingston v. 274		Skillern's Ex'rs v. May's Ex'rs..	267
Maryland Ins. Co. v. Ruden's Adm'r.....	338	Slacum v. Pomeroy.....	221
Maryland Ins. Co. v. Woods....	29	Smith v. State of Maryland.....	286
Massie v. Watts.....	148	Smith, Vasse v.....	226
May's Ex'rs, Skillern's Ex'rs v ..	267	Stark, Chesapeake Ins. Co. v....	268
McKnight v. Craig's Adm'r....	183	State of Maryland, Smith v....	286
Mutual Assurance Society, At- kinson v.....	202	Stewart v. Anderson.....	203
Mutual Assurance Society, Korn v.....	192		
N			
Negro Ben, Scott v.....	3		
O			
O'Neale v. Thornton.....	53		
P			
Peck, Fletcher v.....	87		
Pitot, Sere v.....	332		
Pomeroy, Slacum v.....	221		
R			
Rachel, The, v. United States..	329		
Riddle v. Mandeville.....	86		
S			
Scott v. Negro Ben.....		Scott v. Negro Ben.....	3
Sere v. Pitot.....		Sere v. Pitot.....	332
Sheehy v. Mandeville.....		Sheehy v. Mandeville.....	253
Skillern's Ex'rs v. May's Ex'rs..		Skillern's Ex'rs v. May's Ex'rs..	267
Slacum v. Pomeroy.....		Slacum v. Pomeroy.....	221
Smith v. State of Maryland.....		Smith v. State of Maryland.....	286
Smith, Vasse v.....		Smith, Vasse v.....	226
Stark, Chesapeake Ins. Co. v....		Stark, Chesapeake Ins. Co. v....	268
State of Maryland, Smith v....		State of Maryland, Smith v....	286
Stewart v. Anderson.....		Stewart v. Anderson.....	203
T			
Thornton, O'Neale v.....		Thornton, O'Neale v.....	53
Tuel, Tyler v.....		Tuel, Tyler v.....	324
Tyler v. Tuel.....		Tyler v. Tuel.....	324
U			
United States v. Durousseau...		United States v. Durousseau...	307
United States v. Hall.....		United States v. Hall.....	171
United States, The Amiable Lucy v.....		United States, The Amiable Lucy v.....	330
United States, The Alligator v..		United States, The Alligator v..	327
United States v. The Helen....		United States v. The Helen....	203
United States, The Juliana v... 327		United States, The Juliana v... 327	
United States, The Rachel v... 329		United States, The Rachel v... 329	
W			
Watts, Massie v.....		Watts, Massie v.....	148
Wilson, Ex parte.....		Wilson, Ex parte.....	52
Woods, Maryland Ins. Co. v....		Woods, Maryland Ins. Co. v....	29
Y			
Young v. Grundy.....		Young v. Grundy.....	51

A TABLE
OF THE
CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

A

	*PAGE
Alexander <i>v.</i> Mayor of Alexandria .5 Cr. 1.....	20
Arglasse <i>v.</i> Muschamp.....1 Vern. 75.....	159
Ashbrook <i>v.</i> Snape..... Cro. Eliz. 240.....	258
Atlantic, The.....7 T. R. 705.....	40

B

Bainbridge <i>v.</i> Nielson.....10 East 329.....	76
Barker <i>v.</i> Cheviott.....2 Johns. 346.....	76
Barker <i>v.</i> Blakes.....9 East 283.....	76
Betsy, The.....1 Rob. 280, 281.....	42
Blackenhagen <i>v.</i> London Ass. Co.1 Camp. 454.....	75
Bollman, Ex parte.....4 Cr. 75.....	310
Brainthwait <i>v.</i> Cornwallis.....Cro. Car. 85, 86.....	258
Brewster <i>v.</i> Kitchell.....1 Salk. 198.....	76

C

Colomb, The.....Emerig. 544 n.....	76
Chappedelaine <i>v.</i> Dechenaux.....4 Cr. 306.....	333-4
Clarke <i>v.</i> Bazadone.....1 Cr. 212.. ..	310
Collins <i>v.</i> Blantern.....2 Wils. 347.....	216
Columbia, The.....1 Rob. 181.....	41
Cook <i>v.</i> Jennings.....7 T. R. 381.....	76
Cooper <i>v.</i> Telfair.....4 Dall. 14.....	121
Craig <i>v.</i> Craig.....1 Call 483.....	83
Curling <i>v.</i> Long.....1 Bos. & Pul. 634.....	76

D

Da Costa <i>v.</i> Firth.....4 Burr. 1966.....	213
Darwent <i>v.</i> Walton.....2 Atk. 510.....	258

CASES CITED.

	*PAGE	
Davenport v. Mason.....	2 Wash. 200.....	51
Davis v. Fulton.....	MS.....	191
De Gheton v. London Ass. Co.....	3 Bro. P. C. 525.....	216
Dederer v. Delaware Ins. Co.....	2 W. C. C. 61.....	75
Downman v. Downman.....	1 Wash. 26.....	212
Drake v. Mitchel.....	3 East 250.....	258
Driscoll v. Bovil.....	1 Bos. & Pul. 313.....	76
Driscoll v. Passmore.....	1 Bos. & Pul. 200.....	76

E

Earl of Kildare v. Eustace.....	1 Vern. 419.....	160
---------------------------------	------------------	-----

F

Fearnes v. Smith.....	Roll. Abr. 530.....	228
Fraser's Case.....	3 Co. 77.....	212
Fitzsimmons v. Newport Ins. Co.	4 Cr. 199.....	39, 42

G

Garrigues v. Coxe.....	1 Binn. 592.....	173
Goss v. Withers.....	2 Burr. 696.....	76
Govett v. Radnidge.....	3 East 62.....	228
Grace, The.....	Park Ins. 168.....	75
Grant v. Parkinson.....	Cowp. 583.....	213
Green v. Elmslie.....	Peake 212.....	173, 320
Guichard v. Roberts.....	1 W. Bl. 445.....	216

H

Hargous v. The Ceres.....	4 Cr. 298.....	282
Henderson v. Hepburn.....	2 Call 282.....	83
Higgens' Case.....	8 Co. 46.....	258
Hiram, The.....	3 Rob. 180.....	76
Hope, The.....	1 Doug. 219.....	75

J

Jude v. Syme.....	3 Call 522.....	216
-------------------	-----------------	-----

K

King v. Grantford Corporation....	7 T. R. 703.....	212
Kulen Kemp v. Vigne.....	1 T. R. 804.....	320

L

Lawe v. Peers.....	4 Burr. 2228.....	215
Lewis v. Rucker.....	2 Burr. 1171.....	215
Lucena v. Crawford.....	5 Bos. & Pul. 310.....	75

M

	*PAGE
McCombie v. Davies.....	6 East 538.....
McGuire v. Gadsby.....	3 Call 234.....
Mandeville v. Riddle.....	1 Cr. 290.....
Marshall v. Delaware Ins. Co.....	4 Cr. 202.....
Mathie v. Potts.....	3 Bos. & Pul. 23.....
Mildmay's Case.....	6 Co. 40.....
Miles v. Fletcher.....	1 Doug. 219.....
Morgan v. Callender.....	4 Cr. 370.....

N

Neptunus, The.....	1 Rob. 144.....
	41, 42

P

Parmer v. Dutilh.....	4 Cr. 298.....
Penn v. Ld. Baltimore.....	1 Ves. 444.....
Perkins v. Smith.....	1 Wils. 328.....
Pollard v. Dwight.....	4 Cr. 421.....
Puckford v. Maxwell.....	6 T. R. 52.....

R

Resler v. Shehee.....	1 Cr. 117.....
Rex v. Derbyshire.....	1 W. Bl. 606.....
Rhinelander v. Penn. Ins. Co.....	4 Cr. 29.....
Rice v. Shute.....	5 Burr. 2613.....
Roberts v. Witherhead.....	12 Mod. 92.....
Rose v. Himely.....	4 Cr. 241.....

S

Sadlers' Co. v. Babcock.....	2 Atk. 554.....
Schmidt v. United Insurance Co.	1 Johns. 249.....
Scott v. Libby.....	2 Johns. 336.....
Smith v. Harmon.....	6 Mod. 142.....
Stedman v. Gooch.....	1 Esp. 3, 5.....
Symonds v. Union Insurance Co....	4 Dall. 417.....
Syeds v. Hay.....	4 T. R. 260.....

T

Tarter, The.....	3 Bos. & Pul. 474.....
Toller v. Carteret.....	2 Vern. 494.....
Tomlinson v. Blacksmith.....	7 T. R. 132.....

U

United States v. Hall.....	6 Cr. 171.....
	319, 321

CASES CITED.

W

	*PAGE
Whelpdale's Case.....	5 Co. 119.....
Wilkins v. Despard.....	5 T. R. 112.....
Wilson v. Codman.....	3 Cr. 193, 208.....
Winch v. Keely.....	1 T. R. 619.....
Wiscart v. D'Auchy.....	3 Dall. 321.....

Y

Youl v. Harbottle.....	Peake 49.....
------------------------	---------------

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1810.

SCOTT v. NEGRO BEN.

Slavery.

The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act.

Negro Ben v. Scott, 1 Cr. C. C. 407, reversed.

ERROR to the judgment of the Circuit Court for the district of Columbia, sitting at Washington, upon a petition for freedom, filed by Negro Ben, against Sabrett Scott, who claimed the petitioner as his slave.

The ground upon which the petitioner claimed his freedom was, that he had been imported into the state of Maryland, contrary to the act of assembly of that state, passed in the year 1783, entitled "an act to prohibit the bringing of slaves into this state," by which it is enacted, "That it shall not be lawful, after the passing this act, to import or bring into this state, by land or water, any negro, mulatto or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be a slave, and shall be free; provided, that this act shall not prohibit any person, being a citizen of some one of the United States, coming into this state with a *bond fide* intention of settling therein, and who shall actually reside within this state for one year at least, to be computed from *and next succeeding his coming into the state, to import or bring in [4] any slave or slaves which before belonged to such person, and which slave or slaves had been an inhabitant of some one of the United States, for the space of three whole years next preceding such importation; and the residence of such slave in some one of the United States, for three years as aforesaid antecedent to his coming into this state, shall be fully proved, to

Scott v. Ben.

the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses."

Upon the trial, the defendant below took two bills of exception. The first was to the opinion of the court, that it was incumbent on the defendant (Scott), in order to bring himself within the proviso contained in the first section of the act of 1783, to show to the jury that it had been fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses, that the petitioner was a resident of some one of the United States for three years antecedent to his coming into the state of Maryland; and that it was not sufficient for the defendant to prove, on the trial, to the satisfaction of the jury, that the defendant, being a citizen of some one of the United States, and coming into the state of Maryland with a *bond fide* intention of settling therein, and who actually resided within the said state for one year at least, computed from and next succeeding his coming into the state, imported the petitioner, who then belonged to the defendant, and that the petitioner had been an inhabitant of some one of the United States for the space of three whole years next preceding such importation.

The second bill of exception was to the refusal of the court to admit, as evidence, two certificates, made during the trial, the one by the collector of the customs and naval officer of the United States, *for the district [5] and port of Georgetown, in the district of Columbia, and the other by a collector of taxes, appointed by the levy court for the county of Washington, in that district; the purport of which certificates was, that Scott had, on that day (16th June 1807), by his own oath, proved, to the satisfaction of each of those officers, respectively, that Ben "was a resident of the state of Virginia, one of the United States, three whole years next preceding the time when the said mulatto Ben was brought into the state of Maryland."

The cause was argued by *C. Lee and Jones*, for the plaintiff in error, and by *Swann and F. S. Key*, for the defendant.

February 7th, 1810.—MARSHALL, Ch. J., delivered the opinion of the court, as follows, viz.—In this case, three opinions were given by the circuit court, to each of which the defendant in that court excepted. These opinions were, in substance :

1. That the master of a slave imported into the state of Maryland, while the act, passed in the year 1783, entitled, "an act to prohibit the bringing slaves into this state," was in force, could not be admitted to prove the fact that such slave had resided three years, previous to his importation into Maryland, in some one of the United States, unless he could show that this fact had been proved to the satisfaction of the naval officer, or collector of the tax.

2. That a certificate made by the naval officer and collector of the port of Georgetown, dated on the 16th day of June, in the year 1807, certifying that this fact was proved to his satisfaction on that day, did not satisfy the law.

*6] 3. That a similar certificate given by the collector *of the tax for the county of Washington, did not satisfy the law.

The correctness of these opinions is to be tested, by comparing them with

Scott v. Ben.

the act under which the plaintiff in the court below claimed his freedom. The enacting clause of that law prohibits the importation of slaves into the state of Maryland, and gives freedom to such as shall be imported contrary to that act. A proviso excepts from the operation of the enacting clause those slaves which, having resided for three years within some one of the United States, and being the property of the importer, should be imported into the state of Maryland, by a person intending to become a resident thereof, and who should actually reside therein for the space of twelve months thereafter. The act then adds, "and the residence of such slave in some one of the United States for three years as aforesaid, antecedent to his coming into this state, shall be fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses."

By the plaintiff in error, it is contended, that this part of the law is directory; that it prescribes a duty to the importer of a slave within the description of the proviso, but does not make his title to that slave dependent on the performance of this duty.

By the defendant, it is contended, that this clause forms a part of the proviso, and that the fact of previous residence within some one of the United States can be proved by no other testimony, if that which is here prescribed be wanting.

The act, in its expression, is certainly ambiguous, and the one construction or the other may be admitted, without great violence to the words which are employed.

The great object of the proviso certainly was, to *permit persons, [*_7 actually migrating into the state of Maryland, to bring with them property of this description, which had been within the United States a sufficient time to exclude the danger of its being imported into America for the particular purpose. The great object of the provision was, that the fact itself should accord with this intention. The manner in which that fact should be proved was a very subordinate consideration. Certainly, the provisions of the law ought not to be so construed as to defeat its object, unless the language be such as absolutely to require this construction.

It would be a singular and a very extraordinary provision, that a naval officer, or the collector of a tax, should be made the sole judge of the right of one individual to liberty, and of another to property. It would be equally extraordinary, that the oath of one of the parties, probably, in the absence of the other, should be conclusive on such a question. It would be not less strange, that the manner in which this *quasi* judge should execute his duty, should not be prescribed, and that not even the attempt should be made to preserve any evidence of his judgment. These considerations appear to the court to have great weight; and the language of the law ought to be very positive, to deprive them of their influence.

Upon an attentive consideration of that language, the majority of the court is of opinion, that the property of the master is not lost, by omitting to make the proof which was directed, before the naval officer, or the collector of the tax, and that the fact on which his right really depends may be proved, notwithstanding this omission.

The words of this part of the section do not appear to the court to be

Field v. Holland.

connected, either in their sense, or in their mode of expression, with the proviso. It is a distinct and a substantive regulation. In legislation, the conjunction "and" is very often used, when a provision is made in no degree [8] dependent *on that which precedes it; and in this case, no terms are employed which indicate the intention of the legislature, prescribing this particular duty, to make the right to the property dependent on the performance of that duty.

It is, then, the opinion of the majority of the court, that the fact of the residence of the plaintiff below within the United States was open for examination, even had his master omitted entirely to make the proof of that residence before the naval officer, or collector of the tax, and consequently, that the circuit court erred in refusing to admit testimony respecting that fact. The opinion of the court on this point renders a decision on the other exceptions unnecessary.

Judgment reversed.

FIELD and others v. HOLLAND and others.

Equity practice.—Auditors.—Issue.—Effect of answer.—Application of payments.

A report of auditors, appointed, by consent of parties, in a suit in equity, is not in the nature of an award by arbitrators, but may be set aside by the court, although neither fraud, corruption, partiality nor gross misconduct on the part of the auditors, be proved.

Without expressly revoking an order of reference to auditors, the court may direct an issue to be tried.

A court of equity may ascertain the facts themselves, if the evidence enables them to do it, or may refer the question to a jury, or to auditors.

After an issue ordered, a court of equity may proceed to a final decree, without trying the issue, or setting aside the order.

The answer of a defendant is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant.

The answer of one defendant is evidence against other defendants claiming through him.

The plaintiffs cannot avail themselves of the answer of a defendant, who is substantially a plaintiff; it is not evidence against a co-defendant.

If neither the debtor, nor the creditor, has made the application of partial payments, the court will apply them to the debts for which the security is most precarious.¹

ERROR to the Circuit Court for the district of Georgia, in a chancery suit, in which Field, Hunt, Taylor and Robeson were complainants, and Holland, Melton, Tigner, Smith, Cox and Dougherty were defendants. The decree of the court below dismissed the bill as to all the defendants.

The bill stated, that on the 21st of July 1787, Micajah Williamson obtained from the state of Georgia a grant of 12,500 acres in Franklin county, in that state. On the 9th of July 1788, Williamson conveyed to Sweepson, who, on the 23d of July 1792, conveyed to Cox, who, on the 3d of September 1794, conveyed to Naylor, who, on the 18th of December [9] 1794, conveyed to the complainant Field, and one *Harland, as tenants in common, and that Harland afterwards conveyed his undivided interest to the other complainants.

That the defendants Melton, Tigner and Smith claimed title to the land

¹ Pierce v. Sweet, 38 Penn. St. 151; Ege v. Watts, 55 Id. 321; Foster v. McGraw, 64 Id. 464; Woods v. Sherman, 71 Id. 100.

Field v. Holland.

in virtue of a sale made by the sheriff to the defendant Melton, upon two writs of *fieri facias*, founded upon judgments obtained by the defendant Holland, against the defendant Cox ; one in the year 1793, for 1556*l.*, the other in 1794, for 3000*l.*, which executions were levied, and sales made thereon in 1799. That the complainants were ignorant of those judgments, at the time of their purchase. That the judgments, or the greater part thereof, were paid and discharged by Cox, before the executions issued thereon ; but the sheriff, well knowing the same, proceeded to levy and sell, &c.

That John Gibbons, the complainants' agent, exhibited to the sheriff an affidavit, stating that the executions had issued illegally, on which it became the duty of the sheriff to return the same into court, and discontinue ministerial proceedings thereon, until the judgment of the court whence the executions issued was first had and obtained in the premises, according to the provisions of the act in such case made and provided. The affidavit of Gibbons stated, that the executions were illegal, because they had not been credited with a partial payment made by Cox.

The bill stated, that the sheriff's sale was fraudulently made with a view to get the land at a very low price ; the sale being for \$300 ; and the land worth \$25,000. That the purchaser Melton, at the time of his purchase, knew of the complainants' title, and indemnified the sheriff for proceeding in the sale, and agreed that he should participate in its benefits.

Melton's answer stated, that in the year 1787, having land-warrants, he surveyed three tracts of 920 acres each, on what he then supposed was vacant land, but which appeared now to be within Williamson's *elder grant, [*10 of which he had no intimation until the year 1797, when he had sold parts of his surveys. Finding that Naylor had Williamson's title, and being desirous of protecting the titles of so much of the land as he had sold, he purchased of Naylor 4505 acres. That with the same view, he afterwards purchased a judgment against Naylor, which he discovered was prior to Naylor's deed to him ; upon this judgment, he caused an execution to be issued, and levied upon the land, which he bought in at a fair sale, under the execution, for \$300. That afterwards, finding that the land had been sold for taxes, and purchased by George Taylor, he purchased Taylor's claim, and paid him \$300 for it. That in June 1799, he first heard of the claim of the complainants, and made a verbal agreement with Gibbons, their agent, for the purchase thereof, at a dollar an acre ; but finding Holland had a prior judgment against Cox which bound the land, and which he was about to enforce by an execution and sale of the land, and Gibbons having failed to compromise with Holland, or otherwise to stop the sale, he (Melton) agreed with Holland, that he (Melton) should become the purchaser at the sale, and would pay Holland \$1500 for the land, without regard to the sum at which it might be struck off to him, which sum he had paid. That this was done, without any fraudulent intention, and to secure his title ; being fully satisfied that the lands were liable to the judgments.

The answer of Dougherty, the sheriff, denied all fraud, combination and interest in the transaction, and averred, that he acted merely in the discharge of his official duty ; and that the sale was fair and *bond fide*. Smith's answer is immaterial, as it related only to 75 acres of the land, which he claimed under a title prior to the complainants. Tigner answered merely as to 357 acres, which he purchased of the defendant Melton, in the year 1797.

Field v. Holland.

*Holland's answer stated, that subsequent to the two judgments, he made large advances to Cox in goods, and took his obligations. It stated sundry payments and negotiations made by Cox, particularly three drafts or inland bills of exchange, given by Cox to Holland, in February 1795, and payable in May, June and July following, for which Holland gave the following receipt: "Washington, 21st February 1795. Received from Zachariah Cox, Esq., three sets of bills of exchange, dated the 5th and 15th instant, for twenty thousand dollars, payable in Philadelphia, which, when paid, will be on account of my demand against said Cox." That in September 1796, a settlement took place between Cox and Holland, of all their transactions distinct from, and independent of, the two judgments, and Holland took Cox's note for \$18,000 for the balance, and gave a receipt, with a stay of execution upon the two judgments for three years. That the judgments "never were dormant, but had been regularly kept alive, and remained unsatisfied." That it was an established rule between Cox and Holland, that all payments made were to go to the discharge of running and liquidated accounts, independent of the judgments, and that mode of settlement was adopted on their last settlement in 1796.

The answer of Cox stated, positively, that the judgments were paid and satisfied, as early as the 14th of September 1796, by settlement of that date, when the parties passed receipts in full of all past transactions. That the three bills of exchange, amounting to \$20,000, were by him delivered to Holland on account of the two judgments, and that the bills had been duly paid and discharged. That the settlement of the 14th of September 1796, was a final settlement of all accounts prior to that day, including judgments, bonds, notes and *all demands whatever up to that time, and particularly the judgments in question. That they exchanged receipts in full; "which receipt the defendant had lost or mislaid." That, upon the settlement being made, Holland promised and verbally engaged to enter up satisfaction upon the said judgments.

The evidence on the subject of the payment of the judgments consisted principally of Mr. Vaughan's deposition, and the letters and receipt of Holland for the bills for \$20,000.

Mr. Vaughan stated, that although he had no particular knowledge how Holland and Cox settled, yet when a new advance was made by Holland to Cox, after the 14th of September 1796, he understood the old concern was settled. In a letter from Holland to Vaughan, of the 18th of April 1795, inclosing the bills for \$20,000, he said, "you will oblige me much by procuring the payment of these bills. I have delayed the execution and sale of Mr. Cox's property, to the great injury of my own affairs, and I request you may assure him, that should the bills not be paid immediately, the consequence must be an assignment of the judgment against him, the result of which will be an immediate sale of his property, which I will not be able to prevent, unless his punctuality in this instance steps forward." "The late stoppage of Mr. Morris and Nicholson, I am fearful, may affect them, but as they, together with Mr. Greenleaf, are concerned with Mr. Cox, in the valuable property which my execution is upon, I expect they will, for their own sakes, see me satisfied, and these drafts paid, to prevent worse consequences." He afterwards said, "I have not security by judgment to the extent of my debt against him." He also urged Mr. Vaughan to obtain security from

Field v. Holland.

Cox, in case the bills should not be paid. In a letter of May 29th, 1795, Holland again said, "I hope you will be able to make some arrangement for the payment of the \$18,000, as I feel a reluctance in pushing the execution I have against the property of *Mr. Cox, although by doing so, I would [*13 make some thousands."

It appeared from Mr. Vaughan's account with Cox, as stated in his deposition, that the bills for \$20,000, and also a draft on I. Nicholson for \$2570, and ten per cent. damages on the \$20,000, excepting a balance of about \$1500, had been paid before the 6th of February 1796; and Mr. Vaughan had given up to Cox his drafts of \$18,000, and \$1000, and \$3000, all of which had been given to Holland on account of prior claims.

On the 23d of December 1803, it was agreed by the parties to this suit, that W. W., I. W., and J. C., or any two of them, be appointed auditors, with power to examine all papers and documents relative to payments made by Zachariah Cox, in satisfaction of judgments obtained by Holland against him, and charged in the bill to be satisfied.

On the 21st of April 1804, the auditors reported, that they were of opinion, from the papers laid before them by both parties, that the judgments had been satisfied, by payments made prior to February 1796. Upon exceptions being taken to this report, it was set aside, on the 14th of May 1804, and G. A., I. P. W., and E. S. were appointed auditors by the court, to report whether the judgments were really satisfied; and that they report a statement of the payments made on the judgments. On the 7th of December 1804, those auditors reported, that they were of opinion, that no payments appeared to have been made on the judgments, no vouchers having been produced to that effect. To this report, exceptions were filed, on the 14th of December 1804. It did not appear upon the record, that any order was taken either respecting the report or the exceptions to it.

*On the 17th of May 1805, the court decreed, that the bill should [*14 be dismissed, with costs, as to Melton, Dougherty, Smith and Tigner; and that Holland should bring an action of debt upon the judgments against Cox, who was to appear by attorney and plead payment, upon the trial of which issue, the bill, answers, exhibits and testimony in this cause were to be considered as evidence. No other notice is taken of the order for an issue at law, and on the 15th of May 1807, the court passed the following decree:

"This cause is involved in much obscurity, but upon mature deliberation, we are of opinion, that there is sufficient ground for us to decree upon. The defendant Holland is in possession of a judgment against Cox, which the latter contends is satisfied, and one of the objects of this bill is to have satisfaction entered of record upon the said judgment. The only difficulty arises upon the application of sundry payments which the complainants contend extinguished the judgment, but which the defendant Holland replies were applicable to other demands. The principle on which the court has determined to decree is this: that all payments shall be applied to debts existing when they were made, and as it appears that there were sundry demands of Holland on Cox which were not secured by judgment, that those sums shall be first extinguished, and the balance only applied to the judgments. This application of those payments is supported by general principles, as well as the particular circumstances of the case.

Field v. Holland.

" 1. The payer had a right, at the time of payment, to have applied it to which debt he pleased, where a number existed, but if he neglects to do so, generally, it rests in the option of the receiver to make the application.

*15] In this case, Cox takes his receipts generally. Even when the large payment *of \$20,000 was made, he takes a receipt on account.

" 2. It appears, that the application of those payments has actually been made in the manner we adjudge ; for from a letter of Mr. Vaughan, through whom most of the payments were made, he intimates that he had given up the evidences of several debts to Cox, because they had been satisfied. Such an act could only have been sanctioned by a knowledge on his part that the money paid through him was in part applicable to those debts.

" The sums which we adjudge to have been due to Holland are the following, viz :

	£. s. d.
Amount of first judgment	1556 0 0
Interest from 1st of May 1793.	
Amount of second judgment	3000 0 0
Interest from 21st of June 1793.	
Amount of acknowledged account	332 10 7
Interest from 11th February 1794.	
Note of March 1st, 1794, Int. Feb. 1st, 1794 . . .	2278 0 0
Note due 1st May 1794	1500 0 0
Interest from 1st May 1794.	

" The payments made by Cox are the following :

	£. s. d.
1794, May 25th, amount paid	11 13 4
June 25th, amount paid	1563 17 10
1795, Feb. 21, amount of bills, \$20,000	4666 13 4
26, amount paid	28 0 0
Bills on Greenleaf	700 0 0
Bills on Cox himself	11 13 4

" Upon the foregoing *data*, the register will state the account between the parties, calculating interest upon the whole amount bearing interest, to the time of payment, and applying the payments according to their dates."

*16] The register having, upon these principles, stated *an account, by which a balance of \$11,086 remained still due on the judgments, the court, by a final decree, dismissed the bill ; and the complainants sued out their writ of error.

Jones and Harper, for the plaintiffs in error, contended, 1. That the court below erred in setting aside the report of the auditors who had been appointed by consent. Their report was like an award, which cannot be set aside but for fraud, or partiality, or gross mistake. 2. In not having decided upon the exceptions taken to the second report of the auditors. 3. In not enforcing or setting aside the order to try an issue. 4. In dismissing the bill as to the purchasers, and retaining it as to Holland. The purchasers had notice of the payment of the judgments. The plaintiffs, at the time of the sale, could not be presumed to have known the full extent of

Field v. Holland.

the payments made. It was sufficient, that the purchasers had notice of the complainants' claim, and that the validity of the sale would be disputed.

The \$20,000 in bills, ought to be applied to the judgments, because that is most beneficial to the payer, as no other debt was then bearing interest. The receipt is upon account of Holland's demand; evidently alluding to the single demand on the judgments. If it had been intended as a general payment, it would have been on account of his demands, in the plural.

The object of the bill is to set aside the sheriff's sale to Melton. He is the only real defendant. Holland is only incidentally interested. It would have been no cause of demurrer, if he had not been made a party. Nor is Cox a necessary party.

*It is true, that the answer of one defendant cannot be taken as evidence against another. If one defendant wishes to avail himself of the testimony of another, he must take out a commission and examine him as a witness. Holland's answer is no more evidence in favor of Melton, than Cox's answer is evidence against him. Holland's answer is only evidence for himself, and no decree is sought against him. If, then, the answers of Cox and Holland are both excluded, the only evidence is Vaughan's deposition, and Melton's answer. If Holland's and Cox's answer be both admitted, the result will be the same, for one destroys the other. Cox is not discredited by Vaughan's deposition. The only facts proved are the two judgments and the payment of \$20,000.

If money be paid on account, it is to be applied, in equity, most beneficially for the debtor. It is not now in the power of the creditor to apply it to which demand he pleases. If neither party, at the time of payment, made the application, it is the province of the court of equity to make it now. The court is to judge, from all the circumstances of the case, what was the intention of the parties, and what application of the money would be most beneficial to the debtor. Vaughan considered it as a settlement of all accounts.

Notice that the judgment was satisfied was not necessary; the purchaser was bound to take notice—*caveat emptor*. But if notice was necessary, enough was given to put the purchaser upon inquiry.

MARSHALL, Ch. J.—Can the sheriff, in Georgia, sell the whole of a large tract for a small debt? or must he confine himself to the sale of enough to pay the debt?

JOHNSON, J.—The sheriff cannot divide a tract *of land. If there are several tracts of land, he may sell that which comes nearest to the sum.

Harper.—An objection has been made to the copy of the deed from Williamson to Sweepson, that it does not appear, that the original deed was recorded in due time. But this objection comes too late in the appellate court. Not having been made in the court below, it must be considered as having been waived.

The first report of the auditors was pursuant to their authority, and can only be impeached for corruption, or gross impropriety of conduct, or mistake appearing upon the record.

F. S. Key and C. Lee, contrà.—The report made by auditors, under an

Field v. Holland.

order made by consent, may be set aside as well as a report made by auditors under a reference made by the simple order of the court. This report was excepted to because the auditors report only their opinion generally, that the judgments were satisfied, and do not report the payments in particular which had been made upon them.

LIVINGSTON, J.—It does not appear, what was done with those exceptions.

Key.—It is to be presumed, that they were properly disposed of. The cause was afterwards fully heard. The second report states, that no payments appear to have been made upon the judgments. The exceptions to this report were abandoned. As to the issue ordered to be tried, it was a mere interlocutory order, which the court was not bound to pursue; but might *19] if they thought proper, proceed *to a final hearing, without trying the issue, or setting it aside formally.

No notice that the judgments were satisfied, is averred or proved. The payments were not made upon the judgments, and have been properly applied to other accounts. If Cox did not, at the time, direct to which account the payments should be applied, Holland might apply them to which account he pleased. If neither party has applied them, the court will apply them to claims not secured by judgments.

Every debt due to Holland from Cox made but one demand. The notes due to Holland were payable in May; the bills for \$20,000 did not become due until after May, although drawn in February. If the bills were given on account of the judgments, there would have been a stay of execution until the bills became payable. When arrested in Philadelphia, Cox did not allege that the judgments had been satisfied; nor is it averred in his answer.

No good title is shown from Williamson. The original deed is not produced, and it does not appear from the copy, whether the original was recorded in due time.

The first auditors exceeded their authority; they were only authorized to do a ministerial act, but they assumed to act judicially. The report of the second auditors was correct; they were competent to say that no payments had been made upon the judgments.

Cox's answer is no evidence against Holland. If the complainants wished to avail themselves of Cox's testimony, they ought to have taken out a commission and examined him. But Holland's answer is evidence for him and *20] *those claiming under him, and is conclusive, unless contradicted by two witnesses. Cox's answer is discredited in a material point, viz., the payment of the judgments.

This court decided, in the case of the *Mayor and Commonalty of Alexandria v. Patton and others* (5 Cr. 1), that if the debtor do not, at the time of payment, direct to which account it shall be applied, the creditor may, at any time afterwards, apply it to which account he pleases.

In equity, all debts bear interest.

February 12th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—In this case, some objections have been made to the regularity of the proceedings in the circuit court, which will be considered, before the merits of the controversy are discussed.

In May term 1803, the following order was made: “By consent of

Field v. Holland.

parties, it is agreed, that William Wallace, James Wallace and John Cuming, or any two of them, be appointed auditors, who shall have power to examine all papers and documents relative to payments made by Zachariah Cox, in satisfaction of judgments obtained by said Holland against said Zachariah, and charged in said bill to be satisfied, and that the testimony of John Vaughan, taken by complainants before Judge Peters, and now in the clerk's office, may be produced by them to said auditors. And it is further agreed, that said auditors may meet at any time after the first day of April next, and not before, on ten days' notice given to the adverse party."

The auditors returned the following report : "We are of opinion, from the papers laid before *us, by both parties, that the judgments in the [*21 above case have been satisfied, by payments made prior to February, 1796." On exceptions, this report was set aside.

By the plaintiffs in error, it is contended, that the order under which the auditors proceeded was equivalent to a reference of the cause by consent, and that their report is to be considered as an award obligatory on all the parties, unless set aside for some of those causes which are admitted to vitiate an award. But this court is unanimously of opinion, that the view taken of this point by the plaintiffs is incorrect. The order in question bears no resemblance to a rule of court referring a cause to arbiters. It is a reference to "auditors," a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. The order in this case, so far from implying that the decision of the auditors shall be made the decree of the court, does not even require, in terms, that the auditors shall form any opinion whatever. There are merely directed to examine all papers and documents relative to payments made in satisfaction of the judgments. From the nature of their duty, they were bound to report to the court, and to state the result of their examination, but this report was open to exception, and liable to be set aside. In the actual case, the report was a very unsatisfactory one, and was, on that account, as well as on account of the objections to its accuracy, very properly set aside.

The cause was again referred to auditors, who reported that no evidence had been offered to them of payments to be credited on the judgments alleged by the plaintiffs to have been discharged. The defendants insist, that this report ought to *have terminated the cause. But the court [*22 can perceive no reason for this opinion. If there were exhibits in the cause which proved that payments had been made, the plaintiffs ought not to be deprived of the benefit of those payments, because the auditors had not noticed the vouchers which established the fact.

The court, without making any order relative to this report, directed an issue for the purpose of ascertaining, by the verdict of a jury, the credits to which the plaintiffs were entitled. It was completely in the discretion of the court to ascertain this fact themselves, if the testimony enabled them to ascertain it ; or, if it did not, to refer the question either a to jury, or to auditors. There was, consequently, no error, either in directing this issue, or in discharging it.¹

¹ See Garsed v. Beall, 92 U. S. 684.

Field v. Holland.

But without trying the issue, or setting aside the order, the court has made an interlocutory decree, deciding the merits of the case, by specifying both the debits and credits which might be introduced into the account, and directing their clerk to state an account in conformity with that specification.

This interlocutory decree is undoubtedly an implied discharge of the order directing an issue, and is substantially equivalent to such discharge. Had the issue been set aside, in terms, in the body of the decree, or by a previous order, it would have been more formal, but the situation of the case and of the parties would have been essentially the same. The only real objection to the proceeding is, that the parties might not have been prepared to try the cause in court, in consequence of their expectation that it would be carried before a jury. There is, however, no reason to believe that this could have been the fact. Had there been any objection to a hearing, on this ground, it would certainly have been attended to, and if overruled, would have been respected by this court. But no objection appears *23] to have been made, and *the inference is, that the cause was believed to be ready for a trial.

These preliminary questions being disposed of, the court is brought to the merits of the case.

The plaintiffs claim title to a tract of land, in the state of Georgia, under several mesne conveyances from Micajah Williamson, the original patentee. In the year 1793, while these lands were the property of Zachariah Cox, one of the defendants, two judgments were rendered against him in favor of John Holland, also a defendant, for the sum of 4556*l.* sterling. These judgments remained in force until the year 1799, when executions were issued on them, which were levied on the lands of the plaintiffs, held under conveyances from Cox, made subsequent to the rendition of the judgments. John Gibbons, the agent of the plaintiffs, objected to the sale, because the judgments were satisfied, either in whole or in part, but as he failed to take the steps prescribed in such case by the laws of Georgia, the sheriff proceeded, and the lands were sold to Melton and others, who are also defendants in the cause. This bill is brought to set aside the sale and conveyance made by the sheriff; and it also contains a prayer for general relief.

As the judgments constituted a legal lien on the lands in question, and the title at law passed to the purchasers, by the sale and conveyance of the public officer, the plaintiffs must show an equity superior to that of the persons who hold the legal estate. That equity is, that the legal estate was acquired under judgments which were satisfied, and that sufficient notice was given to the purchasers to put them on their guard. If the facts of the cause support this allegation, the equity of the plaintiffs must be acknowledged; but it is incumbent on them to make out their case.

*24] *In the threshold of this inquiry, it becomes necessary to meet an objection suggested by the plaintiffs relative to the testimony of the cause. It is alleged, that neither Holland nor Cox are necessary or proper parties, and that their answers are both to be excluded from consideration.

The correctness of this position cannot be admitted. The whole equity of the plaintiffs depends on the state of accounts between Holland and Cox. They undertake to prove that the judgments obtained by Holland against Cox are satisfied. Surely, to a suit instituted for this purpose, Holland and

Field v. Holland.

Cox are not only proper but necessary parties. Had they been omitted, it would be incumbent on the plaintiffs to account for the omission, by showing that it was not in their power to make them parties. Not only are they essential to a settlement of accounts between themselves, but, in a possible state of things, a decree might have been rendered against one or both of them.

Neither is it to be admitted, that the answer of Holland is not testimony against the plaintiffs. He is the party against whom the fact, that the judgments were discharged, is to be established, and against whom it is to operate. This fact, when established, it is true, affects the purchasers also, but it affects them consequentially, and through him : it affects them as representing him. Consequently, when the fact is established against or for him, it binds them. The plaintiffs themselves call upon Holland for a discovery. They aver that the judgments were discharged, and expressly require him to answer this allegation. They cannot now be allowed to say, that this answer is no testimony.

The situation of Cox is different. Though nominally a defendant, he is substantially a plaintiff. Their interest is his interest : their object is his object. He, as well as the plaintiffs, endeavors to show that the judgments were satisfied. He is not to be considered as really a defendant, nor does the bill charge him with colluding to defraud the plaintiffs, or require [**25 him to answer the charge of contributing to the imposition alleged to have been practised on them. It is not in the power of the plaintiffs, in such a case, to avail themselves of the answer of a party who is, in reality, though not in form, a plaintiff.¹

The answer of the defendant Holland, then, where it is responsive to the bill, is evidence against the plaintiffs, although the answer of Cox is not testimony against Holland.

The evidence in the cause, then, is the answer of Holland, the deposition of Vaughan, and the various exhibits and documents of debt which are found in the record. Does this testimony support the interlocutory decree which was rendered in May term 1805 ?

That decree specifies the debits and credits which are to be allowed, and directs a statement to be made showing how the account will stand, allowing the specified items.

To this order, two objections may be made. 1. That it ought to have been more general. If this be overruled, 2. That its principles are incorrect.

Upon the first objection, it is to be observed, that a court of chancery may, with perfect propriety, refer an account generally, and on the return of the report, determine such questions as may be contested by the parties ; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the principles on which the account is to be taken. The propriety of the one course or of the other depends on the nature of the case. Where items are numerous, the testimony questionable, the accounts complicated, the superior *advantage of a general reference, with a direction to state specially such matters as either party [**26

¹ The separate answer of one defendant is not evidence against another, except when they stand in such relation to each other, that the admission of one, not under oath, would be evidence against the others. *Dick v. Hamilton*, 1 Deady 822.

Field v. Holland.

may require, or the auditors may deem necessary, will readily be perceived. Where the account depends on particular principles which are developed in the cause, the convenience of establishing those principles before the report is taken, will also be acknowledged. The discretion of the judge will be guided by the circumstances of the case, and his decree ought not to be reversed, because he has pursued the one course or the other, unless it shall appear, either that injustice has been actually done, or that there is reason to apprehend it has been done.

In this case, it might, perhaps, have been more satisfactory, had the parties been permitted to lay all their claims and all their objections before auditors, so that the precise points of difference between them, and the testimony upon those points, might be brought in a single view before the court. But it is to be observed, that two orders of reference had before been made, on neither of which was a satisfactory report obtained. That an issue had been directed, which had, for several terms, remained untried. The probability is, that the controversy depended less on items than on principles, and that all parties were desirous of obtaining from the court a decision of those principles. That no debits nor credits were claimed but those which were stated in the papers, and that all parties wished the opinion of the court on the effect and application of those items. Under such circumstances, a judge would feel much difficulty in withholding his opinion. In such a case, the justice of the cause could be defeated only by the exclusion of some item which ought to be admitted, or by an erroneous direction with respect to those items which were introduced.

*^{27]} This court perceives in the record no evidence of any credit to which the defendant Cox might be entitled, which is not comprehended in the recapitulation of credits allowed him in the circuit court, and they are the more inclined to believe that no such omission was made, as the fact would certainly have been suggested by the counsel for the plaintiffs, and the circumstances under which they claimed the item disallowed by the court, would have been spread upon the record. It is true, an additional credit is claimed, in the assignment of errors; but the testimony in the record does not support this claim. The majority of the court, therefore, is of opinion, that there is no error in the interlocutory decree, unless it shall appear that the principles it establishes are incorrect.

The items claimed by Holland, and allowed by the court, are supported by documents, the obligation of which has not been disproved. There is, then, no question on the merits but this:—Were the payments properly applied by the court, or were they applicable to the judgments?

The principle, that a debtor may control, at will, the application of his payments, is not controverted. Neither is it denied, that, on his omitting to make this application, the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the court; and in its performance, a sound discretion is to be exercised.

It is contended by the plaintiffs, that if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When *^{28]} a debtor fails to avail himself of the power which he possesses, in consequence of which *that power devolves on the creditor, it does not

Field v. Holland.

appear unreasonable to suppose, that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable, that an equitable application should be made.¹ It being equitable, that the whole debt should be paid, it cannot be inequitable, to extinguish first those debts for which the security is most precarious. That course has been pursued in the present case.

But it is contended, that bills for \$20,000 were received, and have been applied in discharge of debts which became due two months afterwards. If the receipt given for these bills purported to receive them in payment, this objection would be conclusive. If an immediate credit was to be given for them, that credit must be given on a debt existing at the time, unless this legal operation of the credit should be changed by express agreement. But the receipt for these bills does not import that immediate credit was to be given for them. They are to be credited, when paid. The time of receiving payment on them is the time when the credit was to be given; and consequently, the power of application, which the creditor possessed, if no agreement to the contrary existed, was then to be exercised. It cannot be doubted, that he might have credited the sums so received to any debt actually demandable at the time of receiving such sum, unless this power was previously abridged by the debtor.

It is contended, that it was abridged; and that this is proved by the form of the receipt. The receipt states, that the bills, when paid, are to be credited on account of the demand of Holland against Cox, and the plaintiffs insist that the words import a single demand, and one existing at the time the receipt was given. This court is not of that opinion. The whole *debt due from one man to the other, may well constitute an aggregate sum, not improperly designated by the term demand, and the receipt may very fairly be understood to speak of the demand existing when the credit should be given.

If the principles previously stated be correct, there is no evidence in the cause which enables this court to say that there was not due, on the judgments obtained by Holland against Cox, a sum more than equal to the value of the lands sold under execution. If so, the plaintiffs have no equity against the purchasers of those lands, whose conduct appears to have been perfectly unexceptionable; and the bill, both as to them and Holland, was properly dismissed.

It is the opinion of the majority of the court, that there is no error in the proceedings of the circuit court, and that the decree be affirmed.

¹ Bank of the Commonwealth v. Mechanics' Bank, 94 U. S. 439; Leef v. Goodwin, Taney Dec. 460.

MARYLAND INSURANCE COMPANY v. WOODS.

Decree of foreign court of admiralty.—Breach of blockade.—Deviation.

In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty.

Quare? Whether breach of blockade, by a vessel not warranted neutral, would discharge the underwriters?

If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation.

A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders of April 1804. She was not bound to make inquiry elsewhere than of the blockading force.¹

ERROR to the Circuit Court for the district of Maryland, in an action of covenant, upon two policies of insurance, one upon the schooner William & Mary, Travers, master, and the other upon her cargo, "from Baltimore to Laguayra, with liberty of one other neighboring port, and at and from them, or either of them, back to Baltimore." The policy contained the following clause: "Confessing ourselves paid the consideration due unto us for the assurance of the said assured, or his assigns, after the rate of seven and one-half per cent. on cargo, by said vessel, warranted by the assured to be American property, and that the vessel is an American bottom, proof of which to be required in the United States only. Insured against all risks, *30] the *assured binding himself to do all in his power, in case of capture, for the defence of the property, and, if condemned, that he will enter an appeal, if practicable."

Upon the trial of the issue of *non infredit*, seven bills of exception were taken. The first was by Woods, the plaintiff below, in whose favor the judgment was rendered, and was, therefore, unimportant, excepting that it stated the facts which each party offered evidence to prove, and was referred to in all the other bills of exception.

It stated, that the plaintiff gave evidence, that he was a citizen of the United States, and sole owner of the vessel and cargo, of the value insured, and made insurance thereupon, according to the policies. That the vessel arrived in safety off the port of Laguayra, on the 29th of March, but was refused permission to enter the port, except upon terms, as to the sale of his cargo, which the master deemed too disadvantageous to be accepted. That he remained with his vessel, off the port, endeavoring to obtain permission to enter it, on more advantageous terms, until the 31st of March, when, finding that such permission could not be obtained, he sailed with the vessel and cargo towards the port of Amsterdam, in the island of Curaçoa, with a view and intention of ascertaining, by inquiring from British ships of war, or other ships, or by actual inspection, or other proper means, whether the said port was in a state of blockade, and of entering it, if he should find it not blockaded. That about four months before, he had been informed in Baltimore, that an American vessel, bound to that port, had been warned off by the British blockading force; and a report, which he had heard in

¹ And if warned off, the vessel may again return to make inquiry, if the master have reasonable ground to believe that the blockade has ceased. s. c. 7 Cr. 402. And see The Forest King, Blatch. Pr. Cas. 2, 45; The Empress, Id 659.

Maryland Insurance Co. v. Woods.

Baltimore, before he sailed, that the island was still blockaded, induced him to suppose, at the time of sailing towards Amsterdam, that that port might still be in a state of blockade (he then being ignorant of that fact, and not having been able to obtain information relative thereto off Laguayra), and to resolve to make *inquiry as aforesaid, before he attempted to enter [31 the port. That on the first of April, on his passage to Amsterdam, being then about 28 or 30 miles distant therefrom, he discovered a ship, distant about 21 miles, and immediately changed his course and stood towards her, for the purpose of inquiring whether Amsterdam was still blockaded. The ship was the British ship of war "Fortune," and was then supporting alone the blockade of the port of Amsterdam. While standing towards her, she seized and captured the schooner as prize, under pretence of an attempt to break the blockade, and sent her to Jamaica, where the vessel and cargo were condemned as good prize, whereby they were totally lost to the plaintiff. That the distance of Amsterdam from Laguayra was about 147 miles, which might be run in fifteen or twenty hours. That the plaintiff, upon the first intelligence of the capture, offered to abandon, and demanded payment of the loss.

That the British minister, on the 12th of April 1804, informed the government of the United States, that the siege of Curagoa was converted into a blockade, which notification the government of the United States did not, at any time, make known. That the British government had issued an order to their commanders, and to their admiralty courts, in the West Indies, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have previously been warned not to enter them." That this order was in force at the time of the capture, and had been notified by the British government to the government of the United States, and immediately published in the gazettes of the United States.

That to the eastward of Laguayra, on the Spanish Main, the first port is New Barcelona, at the distance of about 57 leagues from Laguayra. That it is a small port, only entered by small vessels. That *the next port to [32 the eastward of Laguayra, on the Spanish Main, is Cumana, at about the distance of 70 leagues. That about the time of the voyage aforesaid, no vessel could enter the port of New Barcelona, without having obtained permission therefor at Cumana. That the next port on the Spanish Main, from Laguayra, westward, is Porto Cabello, under the same jurisdiction, and at the distance of about 18 leagues; that no vessel could enter that port, without having obtained permission therefor at Laguayra. That the next port on the Spanish Main, to the westward of Laguayra, is Maracaibo, at the distance of about 93 leagues, and about two and a half degrees further west from the port of Amsterdam. That the usual course of trade for vessels from Baltimore with cargoes for Laguayra, assorts for the Spanish Main, is to proceed to the port of Amsterdam, if refused permission to enter Laguayra. That vessels, in such cases, never proceed to Cumana or New Barcelona. That except Amsterdam, and the said ports on the Spanish Main, the nearest port to Laguayra, used for the purposes of trade, is in the island of Porto Rico, distant more than 120 leagues. But that Cartagena, on the Spanish Main, although more distant than Porto Rico, may be reached from Laguayra

Maryland Insurance Co. v. Woods.

in a shorter time, being more in the course of the winds. That there is no port in the island of Bonaire, except a small roadstead on the west side of the island, where there is a small battery and military post. That a vessel bound from Laguayra to Amsterdam, could not touch at the said roadstead, without going about five leagues out of her way, and being delayed three or four hours, and that there is no other place in the neighborhood of Laguayra or of Amsterdam, except Porto Cabello, where information could then have been had respecting the continuance of the blockade.

The defendants then offered evidence to the jury, that when Travers sailed from Baltimore, and when he arrived at Laguayra, and when he sailed from thence and arrived near the island of Curaçoa, he had reason to believe, *33] and did know, that the island *was actually blockaded, and attempted to enter the port of Amsterdam. That when the insurance was effected, a vessel might enter Cumana and Porto Cabello, without first obtaining permission elsewhere. That the Spanish government was a party in the war. That it has been usual and customary for vessels sailing from Baltimore, having cargoes suitable to the markets on the Spanish Main, to proceed direct to either of the ports of Cumana, New Barcelona, Porto Cabello, Maracaibo or Carthagena, without first calling at Laguayra for permission.

Whereupon, the plaintiff prayed the direction of the court to the jury, that if they believed the matters so offered in evidence by him, then the proceeding towards the port of Amsterdam for the purposes and in the manner so by the plaintiff stated and offered in evidence, did not, in operation of law, deprive him of his right to recover for the said losses under the said policies.

But the court were of opinion, and so directed the jury, that if they shall be satisfied from the evidence in the case, that Travers, the master of the schooner, had reason to believe that the island of Curaçoa was actually blockaded at the time when he sailed from Laguayra, and when he arrived near the said island, and that he attempted to enter the port of Amsterdam, then the plaintiff could not maintain the present action. To which opinion, the plaintiff excepted.

The 2d bill of exceptions stated that the defendants, in addition to the evidence by them offered as stated in the first bill of exceptions, gave in evidence that Captain Travers might have obtained information at Laguayra of the blockade of Curaçoa (it being well and generally known there), if he had made the inquiry; but that he made no such inquiry. That there is a small island to the eastward of *Curaçoa, called Bonaire, and about *34] 20 miles distant therefrom, on the direct and usual route to Curaçoa, and where Captain Travers might also have received information of the blockade, but he sailed past the island, without stopping thereat, or taking any measures whatever to learn whether the blockade existed or not. That after Travers found he could not sell his cargo to advantage at Laguayra, he determined to proceed to Porto Rico, and as Curaçoa was very little out of the course, to ascertain whether the blockade still continued. That on the 12th of April 1804, the blockade of Curaçoa was notified by the British minister to our government, and that there had been no notification of a discontinuance thereof. That when the schooner left Baltimore, it was generally reported and understood, that Curaçoa was blockaded. They

Maryland Insurance Co. v. Woods.

also offered in evidence, the record and proceedings of the admiralty court of Jamaica, and that the schooner was condemned on the ground of an attempt to violate the blockade. Whereupon, the plaintiff offered in evidence all the matters by him offered in evidence as stated in the first bill of exceptions (which bill of exceptions was referred and made part of this bill of exceptions), and also offered in evidence that the matters by the defendants stated in this and the foregoing bill of exceptions were untrue ; and also that Travers, while lying off Laguayra, did inquire whether the blockade of Curaçoa still continued, and could obtain no information on that subject ; and also, that at the time he discovered the ship of war, he might have proceeded to, and entered into, the port of Amsterdam, without being intercepted by the frigate.

Upon which aforesaid statement of facts, so given in evidence, the defendants pray the court to instruct the jury, that the said Travers was not justified in sailing from Laguayra, and passing the island of Bonaire, without inquiring there, whether the port of Amsterdam was blockaded, and that in consequence thereof, the plaintiff was not entitled to recover.

*But the court were of opinion, that if the jury should be satisfied, from the evidence in the case, that Travers sailed from Laguayra [*35 for Amsterdam, with intent to enter that port, if not actually blockaded, but if blockaded, not to attempt to enter, but to sail for the island of St. Thomas ; and if the jury should be satisfied, from the evidence, that Travers did not attempt to enter the said port, but was captured on his way thither, at the distance of 29 or 30 miles therefrom, the court directed the jury that such conduct of Travers was not unlawful, and that, notwithstanding such conduct, the plaintiff could maintain the present action.

The 3d bill of exceptions stated, that the defendants, upon all the matters in the preceding bills of exceptions contained, prayed the court to instruct the jury, that if they believed that the blockade was notified by the British government to the American government, in a reasonable time before Travers sailed, and that it was generally known in Baltimore, before he sailed, and that he had been informed of it, and knew of the general report and belief, and under these circumstances, sailed from Laguayra to the port of Amsterdam, without making due inquiry at Laguayra, whether the blockade subsisted at Amsterdam, and passed Bonaire, without making such inquiry, to the place where he was captured, then he was not justifiable in proceeding on the said voyage to Curaçoa, there to make inquiry, not having first made the inquiry, in the neighboring ports of Laguayra and Bonaire. The court refused to give the instruction as prayed, but repeated the instruction stated in the second bill of exceptions ; to which, the defendants excepted.

The 4th bill of exceptions stated, that the defendants prayed the court to direct the jury, that if they should be of opinion, that there are three ports on the Spanish Main, viz : Port Cabello, at the distance of 21 leagues from Laguayra ; Maracaibo, at 93 leagues *from Laguayra, and about $2\frac{1}{2}$ leagues further west than Amsterdam ; and Cartagena, at the distance of 185 leagues from Laguayra to the westward; and that the prevailing winds there are generally from the eastward, and that a voyage might be performed with more facility from Laguayra to Porto Cabello than to Curaçoa, and from Laguayra to Maracaibo and Cartagena, than to the island of St. Thomas, or Porto Rico. That those ports were situated on the Spanish

Maryland Insurance Co. v. Woods.

Main, and under the government and jurisdiction of the King of Spain. That vessels sailing from the ports of the United States were in the habit of sailing direct to the said ports of Porto Cabello, Maracaibo and Carthagena, without obtaining permission from the government, at Laguayra. That vessels leaving the United States with cargoes suited to the market on the Spanish Main, frequently sailed from Laguayra, to one or other of the above-mentioned ports for the disposal of their cargoes. That the island of Curaçoa belonged to the Dutch government, who were parties to the war. That there were two other ports on the Spanish Main, under the Spanish government, lying to windward of Laguayra, viz : Cumana, 70 leagues, and New Barcelona, 57 leagues from Laguayra, but the voyage from Laguayra to those ports was more difficult than the voyage to Curaçoa, which was 147 miles. That Curaçoa was known to be blockaded, and so notified by the British government to that of the United States, a reasonable time before Travers sailed, and that he knew the same, at the commencement of the voyage ; then Amsterdam was not a port to which he was entitled to go under the said policy. Which direction the court refused to give ; and the defendants excepted.

The 5th exception stated, that the defendants prayed the opinion of the court, upon the whole facts before stated, whether the insured had a right to proceed to Porto Rico or St. Thomas, under the terms of the policy. That the court directed the jury, that he had no such right, and that the defendants excepted.

*The 6th exception stated, that the defendants, upon all the matters aforesaid, prayed the court to instruct the jury, that if they believed that the insured, after his arrival at Laguayra, proceeded on a provisional voyage for the port of Amsterdam, or for Porto Rico, or for St. Thomas, with an intention to go to Amsterdam, if not blockaded, and to Porto Rico or St. Thomas, if the port of Amsterdam was blockaded, he was not so entitled to do, under the policies, and in consequence thereof, that the plaintiff was not entitled to recover. Which direction the court refused to give, but gave the following opinion :

The court having declared, that the said Travers had a right to proceed from Laguayra to Amsterdam, as fully stated in their second opinion, to which they referred, directed the jury, that if they found that the said Travers intended, if the port of Amsterdam was blockaded, to go to the island of Porto Rico or St. Thomas, that such his intention only would not affect the policies ; and that notwithstanding such intention, the plaintiff could maintain his action thereon. To which direction, the defendants excepted.

The 7th bill of exceptions stated, that the defendants upon all the matters in the preceding bills of exception stated, prayed the opinion of the court, that if the jury believed that Travers sailed from Laguayra, on a voyage to St. Thomas or Porto Rico, but with an intention to proceed a small distance out of the way, to see if Amsterdam was blockaded, and in case it was not blockaded, then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants were not answerable ; which opinion and direction the court refused to give, but gave the following opinion :

The court having declared, that the said Travers had a right to proceed from Laguayra to Amsterdam, as fully stated in their second opinion, to which

Maryland Insurance Co. v. Woods.

they referred, they were of opinion, and accordingly directed the jury, that if they found that the said Travers intended, if the port of Amsterdam was *blockaded, to go to the island of Porto Rico, or the island of St. Thomas, such his intention only would not affect the policies aforesaid, and that notwithstanding such intention, the plaintiff could maintain his actions on the said two policies. To which instruction, the defendants excepted.

The verdict and judgment being in favor of the plaintiff, the defendants brought their writ of error.

P. B. Key, for the plaintiffs in error, contended, 1. That the court ought not to have permitted parol evidence to be given of the intention of Captain Travers to break the blockade; because the sentence of condemnation was conclusive evidence of that attempt. Curagoa was not a port within the policy, because the policy did not give leave to sail to a blockaded port. 2. A neighboring port, means a port on the Spanish Main, under the same government as Laguayra. St. Thomas was not a neighboring port; if it was, he deviated in going to Curagoa. He sailed for Curagoa with a knowledge that it was blockaded, and therefore, the defendants are discharged.

Harper, contra.—The evidence is conflicting as to the knowledge of the master of the blockade, and therefore, upon that point, this court can give no opinion. The only evidence of such knowledge is, that there was a blockade at a prior period, which had been notified to our government. But there is a difference between a blockade by notification, and a blockade *de facto*. A vessel has a right to go and inquire of the blockading force. The British government had declared that no blockades should be considered as existing *in the West Indies, except blockades *de facto*, and then not to capture them, unless they should have been previously warned off. Under this order and declaration of the British government, Travers had a right to go and see whether the port was or was not actually blockaded. This court will not extend the principle of blockade further than it has been extended by the British government. The voyage, then, to Curagoa, was lawful. Travers was in the due course of the voyage, and it was altogether immaterial, whether he had any or what other port eventually in view.

Martin, in reply.—Travers had no right to sail for Curagoa, knowing it to be blockaded. If there be, in fact, a blockade, no vessel knowing that fact has a right to go to the blockaded port for inquiry. If she does, she is not, by the law of nations, entitled to warning, but is good prize at once. *Ille hostis est, qui dat auxilium hostibus*. If she sails to a blockaded port, knowing it to be blockaded, she assumes the hostile character, and is to be treated in all respects like an enemy. This was a blockade by notification as well as *de facto*. Our government had express notice, and all our citizens are to be presumed to have notice also. The British treaty is not in force, but it is a correct exposition of the law of nations on the subject of blockade. *Fitzsimmons v. Newport Insurance Co.*, 4 Cranch 199.

The sentence is conclusive evidence of the breach of blockade, notwithstanding the clause in the policy, that proof of the property being American.

Maryland Insurance Co. v. Woods.

is to be made here only. We admit, the property was American—we admit everything that is to be proved under that clause. But it was not agreed, that the question of breach of blockade should be tried here only. If the clause is to be so construed, it would place the insurance companies entirely [40] in the power *of the assured, because all the persons on board are the agents of the assured, and interested to justify their own conduct.

It is the duty of the assured and his agents to do nothing to increase the risk, and to do all in his power to avoid loss; and their negligence or improper conduct will discharge the underwriters. Thus, in the case of *The Ship Atlantic*, Marshall 321, want of a passport, at first sailing, although obtained before capture, and although the capture was not for want of that paper, yet the underwriters were discharged. The insured is answerable for all the improper conduct of the master, if it do not amount to baratry.

Travers knew that Curaçoa was blockaded; at least, he had the strongest grounds for believing it; and if he was not certain, he ought to have inquired at Laguayra, or at Bonaire. This neglect increased the risk and discharged the underwriters.

Curaçoa was not a neighboring part within the meaning of the policy. It means only a port on the Spanish Main. General expressions may be restrained by the nature of the case. Thus, in the case of *Hogg v. Horner*, 2 Marshall 397, the expression in a policy on a voyage from Lisbon to London, "with liberty to touch at any port in Portugal," was construed to mean any port to the northward of Lisbon only.

The fifth exception was taken to the opinion of the court, to show a repugnance between that and the opinion stated in the second bill of exceptions; for if it was unlawful to go to Porto Rico and St. Thomas, it was equally so to go to Curaçoa.

As to the sixth exception to the opinion, that the intention to go to St. Thomas, in case Curaçoa should be blockaded, did not vitiate the policy.

*41] There must, at the commencement of the voyage *from Laguayra, be a certain fixed *terminus ad quem*. Otherwise, the door would be open to fraud upon the underwriters, as there could be no deviation. It ought to have been entered in the log-book to what port they were bound.

Neutral property may be condemned for violation of blockade. *The Ship Neptunus*, 1 Rob. 144. We admit the property to be American, and neutral, but this American neutral vessel attempted to break the blockade.

A notified blockade is presumed *prima facie* to continue, until the contrary be notified, or the blockade be removed *de facto*. 2 Rob. 92, 93, 106, 108; 1 Marsh. 65; *The Columbia*, 1 Rob. 131. This vessel, having knowledge of the blockade, was not entitled to the privilege of being warned off. As to the right to go to Curaçoa to inquire, he cited 1 Rob. 280.

Harper, contrà.—The case cited of the voyage from Lisbon to London, was a mere question as to the meaning of the parties. The nature of the voyage was called in aid of the construction, and it was decided to mean any port in the course of the voyage.

The clause as to proof of the neutrality of the property applies to its neutral character throughout the whole voyage.

Travers had a right to proceed towards the blockaded port for inquiry,

Maryland Insurance Co. v. Woods.

even upon British principles, prior to the order of 1804. But after that order, there can be no doubt. Although there are *dicta* that a vessel sailing for a blockaded port, knowingly, is liable to be condemned, yet in no case is it the direct and sole ground of condemnation. In the case of *The Columbia*, *the vessel was taken in the actual attempt to break the blockade. [*_42] But this doctrine is overruled by the court of errors and appeals in New York. 1 Caines Cas. 8 ; 1 Caines 12 ; *Schmidt v. United Insurance Company*, 1 Johns. 256.

In *The Betsy*, 1 Rob. 280-81, the limitations of the rule as to sailing for a blockaded port knowingly are stated by Sir WILLIAM SCOTT. The distance of the place from whence the vessel sails may excuse. So may also the nature of the blockade. In the West Indies, the blockades were so short and uncertain, as to form an exception to the general rule. *The Neptunus*, 2 Rob. 95. But the British order of 1804 is decisive.

Martin, in reply.—The British order will not bear that construction. It has never received that construction in their courts. If it had, this vessel would not have been condemned.

Nothing but the neutrality of the property is to be proved in this country ; not that the vessel did not conduct herself as a neutral.

The case of *Fitzsimmons v. The Newport Insurance Company*, was a case of naked intention, without an act in pursuance of such intention. Sailing with that intention is an act.

February 16th, 1810. MARSHALL, Ch. J., delivered the following opinion of the court, viz :—This cause comes on upon various exceptions to opinions delivered by the circuit court of Maryland. The first exception, having been taken by the party *who prevailed in the cause, is passed over without consideration. The 2d and 3d exceptions are so intimately connected with each other, that they can scarcely be discussed separately. [*_43]

This action was brought by the owners of the cargo of the William & Mary, to recover from the Maryland Insurance Company the amount of the policy insuring the cargo of that vessel. The voyage insured was “from Baltimore to Laguayra, with liberty of one other neighboring port, and at, and from them or either of them, back to Baltimore.” The cargo was warranted to be American property, and the vessel to be an American bottom, “proof of which was agreed to be required in the United States only.”

Previous to the sailing of the William & Mary from Baltimore, the blockade of Curagoa had been notified to the President of the United States, by the British government, and was generally known in Baltimore. The vessel arrived at Laguayra, from which place she sailed for some other port, was captured within thirty-miles of the port of Amsterdam, in Curagoa, then actually blockaded, and was condemned for an attempt to break the blockade.

The proof whether the William & Mary sailed from Laguayra for Curagoa, or for St. Thomas’s or Porto Rico, is not positive ; and the evidence respecting the information which she sought, or might have received, at Laguayra, respecting the blockade of Curagoa, is contradictory. On the part of the plaintiff below, evidence was given that, at Laguayra, information of this fact was sought and could not be obtained. On the part of the under-

Maryland Insurance Co. v. Woods.

writers, evidence was given, that no inquiry respecting it was made at Laguayra, and further, that there was a small island called Bonaire, between Laguayra and Curaçoa, not much out of the track from the former place *44] *to the port of Amsterdam, at which no inquiry respecting the blockade of Amsterdam was made.

The counsel for the underwriters prayed the court to instruct the jury, that, if they believed these facts, the plaintiff could not recover. This instruction the court refused to give, but did instruct the jury "that if they shall be satisfied, in this case, that Captain Henry Travers, master of the said schooner, sailed from Laguayra for the port of Amsterdam, in the island of Curagoa, with intent to enter the said port, if not actually blockaded, but if blockaded, not to attempt to enter, but to sail for the island of St. Thomas, and if the jury should be also satisfied, from the said evidence, that the said Henry Travers did not attempt to enter the said port, but was captured on his way to the said port, at the distance of 29 or 30 miles therefrom, the court are of opinion, and accordingly directed the jury, that such conduct, on the part of the said Henry Travers, was not unlawful, and that, notwithstanding such conduct, the plaintiff could maintain the present action."

This opinion and direction of the circuit court asserts two principles of law. 1. That the sentence and condemnation of a foreign court of admiralty, condemning a vessel as prize, for attempting to enter a blockaded port, is not conclusive evidence of that fact, in an action on this policy. 2. That, under the circumstances of the case, the sailing from Laguayra, and the passing Bonaire, without making any inquiry, at either place, respecting the blockade of Amsterdam, were not such acts of culpable negligence as to discharge the underwriters.

I. Is the sentence of a foreign court of admiralty, in this case, conclusive evidence of the fact it asserts? *This depends entirely on the *45] construction given to the policy. The question respecting the conclusiveness of a foreign sentence was, some time past, much agitated throughout the United States, and was finally decided, in this court, in the affirmative. Pending this controversy, a change was introduced in the form of the policy, at several offices, by inserting, after the warranty that the property was neutral, the words, "proof of which to be required in the United States only."

By the underwriters, it is contended, that these words go to the property only, and not to the conduct of the vessel. By the assured, it is contended, that they apply to both. The underwriters insist, that the words themselves import no more than that proof respecting the property may be received in the United States, and that a more extended construction is not necessarily to be given to them, in consequence of their connection with the warranty of neutrality, because a neutral vessel attempting to enter a blockaded port would thereby discharge the underwriters, although no warranty of neutrality should be found in the policy. There is much force in this argument, and if the question shall ever occur on such a policy, it will deserve serious consideration. But whatever might be the law in such a case, the majority of the court is of opinion, that, under this policy, the sentence of the foreign court of admiralty is not conclusive.

The contract of insurance is certainly very loosely drawn, and a settled

Maryland Insurance Co. v. Woods.

construction, different from the natural import of the words, is given by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of courts. One of these is, on the warranty that the vessel is neutral property. It is not improbable, that, without such warranty, the attempt of a neutral *vessel to enter a blockaded port [^{*-6} might be considered as discharging the underwriters. But no such decision appears ever to have been made; nor is the principle asserted, so far as is known to the court, in any of the numerous treatises which have been written on the subject. On the contrary, the judgments rendered in favor of the underwriters, in such cases, have been uniformly founded on the breach of the warranty of neutrality, which, though in terms extended only to the property, has been carried, by construction, to the conduct of the vessel. It is universally declared, that anti-neutral conduct forfeits the warranty that the vessel is neutral.

This being the construction put by the parties, and in consequence thereof, by courts, on the warranty of neutrality, it is fair to consider the reservation of the right of giving proof in the United States, which, in direct terms, refers to the whole warranty, as intended by the parties to be co-extensive with the warranty itself; and as the conduct of the vessel was, in legal construction, comprehended in the warranty of her neutrality, that the conduct of the vessel would, in legal construction, be comprehended in the reservation of a right to make proof in the United States. The majority of the court, therefore, is of opinion, that the circuit court did not err in submitting the testimony respecting the conduct of the vessel, in this case, to the jury.

II. Are the underwriters discharged by the conduct of the master? This question is susceptible of several subdivisions. 1. Was the port of Amsterdam, in Curaçoa, a neighboring port, within the policy? 2. Did the intention to pass Amsterdam, if blockaded, discharge the underwriters? ^{*3.} Was an omission to inquire at Laguayra or Bonaire, respecting the [^{*47} blockade of Amsterdam, such a culpable negligence as to discharge the underwriters?

1. It is the opinion of the court, that the port of Amsterdam was a neighboring port within the policy. The distance between the two places is inconsiderable. It is not stipulated, that the neighboring port shall be one under the Spanish government, nor is it to be implied from the nature of the case. Indeed, the common usage of Baltimore, which was given in evidence, for vessels sailing with cargoes assorted for the Spanish Main to and from Laguayra to Curaçoa, if refused admittance into the former port, would be conclusive on this point, if, in other respects, it could be doubtful.

2. Neither was the intention to sail for some other port, on the contingency of finding Amsterdam blockaded, a deviation. It is admitted, that the voyage from Laguayra must be certain, and that only a certain voyage would be within the policy. But the opinion of the circuit court was founded on the jury's believing that the voyage from Laguayra was for Amsterdam, a voyage which the vessel had a right to make, and that the intention to sail to another port, should Amsterdam be blockaded, constituted no deviation while on the voyage to Amsterdam. Certainly, an intention, not executed, will not deprive the assured of the benefit of his contract, in a case in which he would not have been deprived of it, had he

Maryland Insurance Co. v. Woods.

executed his intention. Had Captain Travers, on the voyage to Amsterdam, sustained a partial loss, and after entering that port, determined to go to Porto Rico or St. Thomas, it is certain that, after sailing from Amsterdam, the voyage would have been no longer within the policy, nor would the underwriters have been answerable for a subsequent loss. But it could *48] never be contended, with any *semblance of reason, that this discharged them from the loss sustained on the voyage to Amsterdam.

3. The omission of the master to make any inquiry respecting the blockade of Amsterdam, at Laguayra, or to call, for that purpose, at Bonaire, comes next to be considered. The notoriety of the blockade of Curagoa, before Captain Travers sailed from Baltimore, must affect him, especially, as the instruction given to the jury is not made dependent on their believing that he had no actual knowledge of the fact. It seems a reasonable duty, in ordinary cases, to make inquiry in the neighborhood, if information be attainable, respecting the continuance of a blockade known previously to exist. It is true, that upon this point, contradictory evidence was given ; but the opinion of the court is predicated on the jury's believing that Captain Travers made no inquiry at Laguayra. The correctness of that opinion, therefore, depends on its having been the duty of the master to make this inquiry. In an ordinary blockade, this, perhaps, might have been necessary ; but it is contended, that blockades in the West Indies were so qualified by the British government, as to have dispensed with this necessity.

It was proved, that orders had been given by that government, to its cruisers and courts of vice-admiralty, which orders were communicated to, and published by, the government of the United States, "Not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them." On the motives *49] for this order, on the policy which *dictated this mitigation of the general rule, so far as respected blockades in the West Indies, this court does not possess information which would enable it to make any decision, but it appears essentially to vary the duty of the masters of neutral vessels sailing towards a port supposed to be blockaded.

The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood : it is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not previously receive this warning from one capable of giving it, and consequently, dispenses with her making that inquiry elsewhere. While this order was in force, a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade, until she should be warned off. There is, then, no error in the opinions to which the second and third exceptions are taken.

The 4th exception is taken to the refusal of the court to give an opinion to the jury, that, under the circumstances stated by the defendants below, the port of Curagoa was not a neighboring port within the policy. The

Maryland Insurance Co. v. Woods.

merits of this opinion have been essentially discussed in the view taken of the second and third exceptions, and need not be repeated. The port of Curaçoa is considered as a port within the policy, and consequently, the circuit court ought not to have given the opinion prayed for by the plaintiffs in error.

*The 5th exception presents the extraordinary case of an exception to an opinion in favor of the party taking it, and, consequently, [*50 need not be examined.

The 6th exception presents a case not essentially varying from the second and third, and will, therefore, be passed over, without other observation than that it is decided in the opinion on those exceptions.

The 7th exception is to a different point. The counsel for the defendants below prayed the court to instruct the jury, "that if they believed the said Travers sailed from Laguayra on a voyage to St. Thomas's, or Porto Rico, but with an intention to proceed a small distance out of the way, to see if Amsterdam was blockaded, and in case it was not blockaded, then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants are not answerable." This opinion the court refused to give, and proceeded to repeat the instruction to which the second and third exceptions were taken.

If St. Thomas, or Porto Rico, were not neighboring ports within the policy, as is most probably the fact, then the voyage from Laguayra to either of those places was not insured. If they were neighboring ports, so that a voyage to either of them was within the policy, then going out of the way to see whether Amsterdam was blockaded, was a deviation, and, of consequence, the underwriters are equally discharged.

The only doubt ever felt on this point, was, whether any testimony had been offered to the jury to establish this fact, which would authorize counsel to request the opinion of the court respecting the law. On examining the record, it appears that such testimony was offered. It is stated, that the defendants below offered in evidence, that the master, on finding he could not be permitted to dispose of his cargo at Laguayra, but on terms which amounted to a total sacrifice of it, "determined to proceed to Porto Rico, and as Curaçoa was very little out of the course, to ascertain whether the blockade still continued." [*51

This evidence might be disbelieved by the jury, but the defendants were certainly entitled to the opinion of the court, declaring its legal operation, if believed.

It is the opinion of the court, that, in refusing to give the opinion prayed in the seventh exception, the circuit court erred, for which their judgment is reversed, and the cause remanded for a new trial.

Judgment reversed.

YOUNG v. GRUNDY.

Appeal.—Dissolution of injunction

No writ of error or appeal lies to an interlocutory decree dissolving an injunction.¹

If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing; but upon a question of dissolution of an injunction, they are to be taken to be true.²

THIS was an appeal from an interlocutory decree of the Circuit Court of the district of Columbia, dissolving an injunction.

E. J. Lee, for the appellant.—The decree dissolves the injunction with costs; which is a final decree as to the costs. *Davenport v. Mason*, 2 Wash. 200.

The material facts of the bill are not denied nor admitted by the answer; they are, therefore, to be taken as true. The court below must, therefore, have proceeded on the ground, that the original equity between the maker and payee of the note did not affect the indorsee.³

MARSHALL, Ch. J.—If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction they are to be taken to be true.

But the court has no doubt upon the question. *No appeal or ^{*52]} writ of error will lie to an interlocutory decree dissolving an injunction.

Writ of error dismissed, with costs.

*Ex parte WILSON.**Habeas corpus.*

The writ of *habeas corpus ad subjiciendum* does not lie, to bring up a person confined in the prison-bounds upon a *ca. sa.* issued in a civil suit.⁴

WILSON petitioned the court for a writ of *habeas corpus*, and a *certiorari*, to bring up the record of a civil cause in which judgment had been rendered against him, upon which a *ca. sa.* has issued, by which he was taken and was now in confinement within the prison-bounds upon a prison-bounds bond. His petition stated, that the marshal had demanded of the creditor the daily allowance for the prisoner, agreeable to the act of congress, concerning insolvent debtors within the district of Columbia (2 U. S. Stat. 240, § 15), which the creditor had refused to pay, in consequence of which the marshal had no longer any authority to detain him.

The act of congress provides that the circuit court of the district of Columbia shall, by a general order, fix the daily allowance for the support of prisoners in execution for debt in civil suits, and that "no person, taken in execution for debt or damages in a civil suit, shall be detained in prison therefor, unless the creditor, his agent or attorney, shall, after demand

¹ *Gibbons v. Ogden*, 6 Wheat. 448; *Hiriart v. Ballon*, 9 Pet. 156; *McCollum v. Eager*, 2 How. 61; *Verden v. Coleman*, 18 Id. 86.

² *Poor v. Carleton*, 3 Sumn. 70.

³ For a decision on the merits, see 7 Cr. 548.

⁴ *Wilson v. The Marshal*, 1 Cr. C. C. 608. See *Ex parte Randolph*, 2 Brock. 448; *Ex parte Reardon*, 2 Cr. C. C. 639; *Ex parte Robinson*, 1 Bond 39.

O'Neale v. Thornton.

thereof by the marshal, pay, or give such security as he may require, to pay, such daily allowance, and the prison fees.

The marshal refused to discharge the petitioner ; and his counsel, *E. J. Lee*, now moved for a *habeas corpus*.

MARSHALL, Ch. J., after consultation with the other judges, stated, that the court was not satisfied *that a *habeas corpus* is the proper [*53 remedy, in a case of arrest under a civil process.

Habeas corpus refused.

O'NEALE v. THORNTON.

Sales of lands in Washington.

The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only ; and by that resale the power given by the act is executed.

By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defence, affirmed the title of the third purchaser.

Thornton v. O'Neale, 1 Cr. C. C. 269, reversed.

ERROR to the Circuit Court of the district of Columbia, sitting in Washington, in an action of *assumpsit*, upon a promissory note, dated August 6th, 1800, payable in nine months thereafter, and given by O'Neale to William Thornton, surviving commissioner of the city of Washington, for the purchase-money of lots No. 1 and 2, in the square No. 107, in that city.

The defence set up by O'Neale was, that there was no consideration for the note, inasmuch as the superintendent of the city, who (by virtue of the act of congress passed the 1st of May 1802, entitled "an act to abolish the board of commissioners in the city of Washington, and for other purposes," 2 U. S. Stat. 175) succeeded to all the powers, duties and rights, of the late commissioners, whose office was abolished by that act, had abandoned or rescinded the contract of sale, by having sold and conveyed the same lots to another person in fee-simple.

The bill of exceptions taken at the trial, stated, in substance, the following case : The states of Virginia and Maryland, having, in the year 1789, offered to the United States a cession of territory, ten miles square, for the permanent seat of government, the United States, by the act of congress of the 16th of July 1790 (1 U. S. Stat. 180), entitled "an act for establishing the temporary and permanent seat of the government of the United States," accepted the same, and authorized the president *to appoint certain [*54 commissioners for the purpose of carrying the act into effect. In the summer of 1791, the greater part of the proprietors of the land included within the present bounds of the city of Washington, conveyed the same to Thomas Beall, son of George, and John M. Gant, in trust, to be laid out as a city, and that after deducting streets, avenues and public squares, for the use of the United States, the residue should be equally divided ; one moiety to be reconveyed to the original proprietors, and the other, to be "sold at such time or times, in such manner, and on such terms and conditions as the President of the United States, for the time being, shall direct ;" the purchase-money to be paid over to the president as a grant of money, and to be

O'Neale v. Thornton.

applied for the purposes mentioned in the act of congress of 16th July 1790. The lots so sold were to be conveyed by Beall and Gantt to the purchasers. "And because it might so happen that, by the death or removal of the said Thomas Beall and John M. Gantt, or from other causes, difficulties might occur in fully perfecting the said trust, by executing all the said conveyances, if no eventual provision should be made, it was, therefore, agreed and cov-enanted between all the said parties, that the said Thomas Beall and Johr M. Gantt, or either of them, or the heirs of either of them, lawfully might, and that they, at any time, at the request of the President of the United States, for the time being, would convey all or any of the said lands which should not then have been conveyed in execution of the trusts aforesaid, to such person or persons as he should appoint, subject to the trusts then remaining to be executed, and to the end that the same may be perfected."(a)

*The legislature of Maryland, by an act passed at their November *55] session 1791, c. 45, subjected all the lands in the city belonging to absentees, minors, married women, and persons *non compos mentis*, to the same terms and conditions as are contained in the deeds of trust from the other proprietors, and vested the legal estate thereof in Beall and Gantt: and after declaring the manner in which a division of the property should be made between the original proprietors and the commissioners, it declared, that "all persons to whom allotments and assignments of lands shall be made by the commissioners, shall hold the same in their former estate and interest, and in lieu of their former quantity, and subject in every respect, to all such limitations, conditions and incumbrances, as their former estate and interest were subject to, and as if the same had been actually reconveyed pursuant to the said deed in trust."

By the 4th section, it was further enacted, that "all squares, lots, pieces and parcels of land, within the said city, which have been or shall be appropriated for the use of the United States, and also the streets, shall remain and be for the use of the United States; and all the lots and parcels which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchasers, according to the terms and conditions of their respective purchases." The same section then proceeded to quiet the titles of all persons claiming by purchase from or under original proprietors, who should have been in possession, in their own right, for five years before the passing of the act.

By the act of 1793, c. 58, § 1, the legislature of Maryland further provided, that "the certificates granted, or to be granted, by the said commis-sioners, or any two of them, to purchasers of lots in the said city, with acknowledgment of the payment of the whole purchase-money and interest, if any shall have arisen thereon, and recorded, shall be sufficient to vest the *56] legal estate in the purchasers, their heirs *and assigns, according to the import of such certificates, without any deed or formal conveyance."

(a) In consequence of this clause in the original deeds of trust, and by order of the president, the trustees, Beall and Gantt, transferred the trust to Gustavus Scott, William Thornton and Alexander White, then commissioners of the city of Wash-ing-ton, and the survivors and survivor of them, and the heirs of such survivor, by deed dated the 30th of November 1796. This fact was omitted to be stated in the bill of exceptions, but the cause was argued, as if it had been so stated,

O'Neale v. Thornton.

By the 2d section of the same act, it was enacted, that "on sales of lots in the said city, by the said commissioners, or any two of them, under terms or conditions of payment being made therefor, at any day or days after such contract entered into, if any sum of the purchase-money or interest shall not be paid, for the space of thirty days after the same ought to be paid, the commissioners, or any two of them, may sell the same lots, at vendue, in the city of Washington, at any time after sixty days' notice of such sale, in some of the public newspapers of Georgetown and Baltimore-town, and retain, in their hands, sufficient of the money produced by such new sale, to satisfy all principal and interest due on the first contract, together with the expenses of advertisements and sale; and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which shall have been actually received by them, or under their order, on the said second sale; and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns."

On the 29th of September 1792, the President of the United States, by his order in writing, directed that the sale of lots in the city of Washington, to commence on the 8th of October then next, should be of such lots as the commissioners, or any two of them, should think proper. That the sale should be under their direction, and on the terms they should publish. And it was, on the same day, further ordered by the president, that any lot or lots in the city of Washington might, after the public sale which was to commence on the 8th of October 1792, be sold and agreed for by the commissioners, or any two of them, at private sale, at such price, and on such terms, as they might think proper.

On the 24th of December 1793, after the passing *of the above [**57 recited act of the Maryland legislature, of November session 1793, c. 58, Robert Morris and James Greenleaf entered into a contract with the commissioners for the purchase of 6000 lots in the city of Washington; payable in seven annual instalments. The lots to be selected by Morris and Greenleaf in the manner described in the contract. They selected, among others, the two lots sold afterwards to O'Neale, and for the purchase of which by O'Neale, the note was given upon which the present suit was brought.

Morris and Greenleaf received conveyances for all the lots which they paid for under their contract, but having failed to pay some of the instalments, the commissioners, by virtue of the act of Maryland (1793, c. 58), duly advertised for sale a large number of the lots contracted for by Morris and Greenleaf, including the lots in question. The terms of sale were, that the purchase-money should be paid in three, six and nine months, and secured by good negotiable paper, indorsed to the satisfaction of the commissioners. At this sale, the defendant O'Neale purchased lots No. 1 and 2, in the square No. 107, at a price considerably greater than the amount due thereon from Morris and Greenleaf, and gave his promissory notes therefor, upon one of which the present suit was brought.

By the act of congress passed on the 1st of May 1802 (2 U. S. Stat. 175), it is enacted, "That from and after the first day of June next, the offices of the commissioners appointed in virtue of an act passed on the 16th day of June 1790, entitled, 'an act to establish the temporary and permanent seat

O'Neale v. Thornton.

of the government of the United States,' shall cease and determine ; and the said commissioners shall deliver up to such person as the president shall appoint, in virtue of this act, all plans, draughts, books, records, accounts, deeds, grants, contracts, bonds, obligations, securities and other evidences of debt, in their possession, which relate to the city of Washington, and the *58] affairs heretofore under their superintendence *or care." And it was

further enacted, "That the affairs of the city of Washington, which have heretofore been under the care and superintendence of the said commissioners, shall hereafter be under the direction of a superintendent, to be appointed by, and to be under the control of, the President of the United States ; and the said superintendent is hereby invested with all powers, and shall hereafter perform all duties, which the said commissioners are now vested with, or are required to perform, by or in virtue of any act of congress, or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots in the said city, or in any other manner whatsoever." And it was further enacted, "That the said superintendent shall, prior to the first day of November next, sell, under the directions of the President of the United States, all the lots in the said city which were sold antecedent to the 6th day of May 1796, and which the said commissioners are authorized by law to resell, in consequence of a failure on the part of the purchasers, to comply with their contracts."

Under this act, Thomas Munroe was appointed superintendent, and having given the notice required by the act of Maryland (1793, c. 58), and O'Neale having failed to pay his notes, the superintendent proceeded to sell again the lots No. 1 and 2, in the square No. 107, and one Andrew Ross became the purchaser, for a sum less than the amount due thereon from Morris and Greenleaf, the first purchasers. Ross assigned his interest in the lots to James Moore, to whom the superintendent afterwards conveyed the lots in fee-simple, by a deed which recited the contract between Morris and Greenleaf and the commissioners, for the purchase of 6000 lots ; the selection of lots No. 1 and 2, in square No. 107, as part thereof ; the failure of Morris and Greenleaf to pay the purchase-money therefor ; the sale by the superintendent to Ross, and the assignment by Ross to Moore ; but took no *59] notice of the intermediate sale to O'Neale. The money received *upon the sale to Ross, was, by the superintendent, applied to the credit of Morris and Greenleaf, the original purchasers.

The first resale of lots by the commissioners, for default of payment by purchasers, took place on the 2d of May 1797. Another resale of other lots took place on the 28th of August 1797. At these resales, none of the lots contracted for by Morris and Greenleaf were resold, and in every instance, except one, the lots produced, at such resale, as much as was due thereon from the first purchaser, with interest and expenses of sale. On the 18th of October 1797, the first resale of Morris and Greenleaf's lots commenced, and the commissioners then laid it down as a rule, and from which they never afterwards departed, during the existence of their offices, that no lot should be resold for less than the amount due thereon from the first purchaser, with interest and expenses of sale.

The commissioners, at the time of their resale to O'Neale, had a right to resell the lots for the default of Morris and Greenleaf. The notes given by O'Neale for the purchase-money, were indorsed by Basil Wood, but he

O'Neale v. Thornton.

indorsed only as security, and the only consideration for the notes and the indorsement was the sale of the lots.

Upon second resales of lots, it was the universal practice of the commissioners, to apply the money actually received therefor to the credit of the account of the first purchaser, taking no notice of the intermediate purchaser, and they always sold as for the default of the first purchaser, and all the deeds which they made to purchasers at such resales, recited the first contract only for the purchase of the lot, and the default of the first purchaser as the only cause of such resale ; wholly pretermitted all intermediate purchasers.

Upon this statement of the evidence, the defendant moved the court to instruct the jury, that if they *should find, from the evidence, that the bargain between the plaintiffs and defendant, for the sale of the two lots, was understood and made by the parties, to be upon the condition and contingency, that if the promissory notes given for the purchase-money should be punctually paid, it should become an absolute sale to the defendant, but if the promissory notes should not be punctually paid, the commissioners should have the option of annulling the bargain for the sale, and of reselling the lots as for the original default of Morris and Greenleaf, the first purchasers. And if the jury should further find, from the evidence, that the superintendent, in reselling to Ross, and conveying to Moore, his assignee, did so resell and convey the lots as for the original default of Morris and Greenleaf, in disaffirmance of the bargain to sell them to the defendant, and in pursuance and exercise of such option reserved to the commissioners ; the plaintiffs were not entitled to recover the said purchase-money in this action. Which instruction the court refused to give.

The defendant then prayed the court to instruct the jury, that upon the evidence offered as above, if believed by the jury, the plaintiffs were not entitled to recover any part of the purchase-money bidden by the defendant for the lots, as above mentioned. But the court refused this instruction also; whereupon, the defendant took a bill of exceptions, and sued out his writ of error.

P. B. Key and F. S. Key, for the plaintiff in error.—These lots were originally sold to Morris and Greenleaf, by the commissioners, who, upon the default of Morris and Greenleaf, sold them to the plaintiff in error. Upon his default, the superintendent, who succeeded to the rights, powers and duties of the commissioners, sold them to Ross, who assigned his right to Moore, to whom the superintendent conveyed them, by a deed which passed the *legal estate in fee to Moore. The act of congress, directing him to sell certain lots, does not affect the present question ; for it only directs him to sell such lots as the commissioners were, at the time of passing the act, authorized by law to resell. The question then is, what were the rights and the authority which the commissioners then had respecting these lots ?

We contend, that the power of resale given to the commissioners by the act of Maryland, 1793, c. 58, § 2, can be used but once, and expires in the using. The evils intended to be remedied by that law, were these. Before that act was passed, whenever the commissioners had contracted to sell a lot, and the purchaser failed to pay the purchase-money, at the time stipulated,

O'Neale v. Thornton.

the commissioners could not enforce the payment, by a resale of the lot, without obtaining a decree for that purpose from a court of chancery. This was productive of great delay and expense, which became oppressive in proportion to the great number of sales which they were authorized to make. The expense would not only exhaust the funds intended to be raised from the donation of the lands, but the delay would defeat the object of the donors, which was to provide suitable buildings for the accommodation of the general government.

As the commissioners were public officers of the government, having no personal interest in the subject of their trust, it was deemed prudent and proper, to confide to them a limited portion of the chancery jurisdiction, as to the sales of the public lots. Accordingly, they are authorized by that act, in case the purchase-money should not be paid in thirty days after it ought to have been paid, to sell the lots at vendue, upon sixty days' notice, and to retain sufficient of the money produced by such new sale, to satisfy all principal and interest due on the first contract, with the expenses of sale ; *62] and the original purchaser, or his assigns, was entitled to receive *the balance of the money which should be actually received by them on the second sale ; and such lots were to be freed of all claim, legal and equitable, of the first purchaser, his heirs and assigns.

This was a short and summary mode of foreclosing the equity of the first purchaser, and of collecting the purchase-money. It was, in effect, a statutory decree for those purposes. It not only does not contain an authority to continue to resell, as often as default should be made, but it contains expressions inconsistent with such a construction. Thus, the commissioners are to retain only sufficient to satisfy the first contract, and the surplus is to be paid to the original purchaser only. Whatever, therefore, might have been the sum received from the sale to Ross, O'Neale could derive no benefit therefrom ; if he would not have been entitled to the surplus, he cannot be chargeable with the deficiency, without attributing to the legislature the most palpable injustice ; an imputation which can never be consistent with the true construction of a doubtful statute. Indeed, the statute does not contemplate the possibility of a deficiency ; it makes no provision for such a case, and it speaks of the balance as being certainly in favor of the first purchaser, in all cases. Nor does it contemplate the necessity of a second resale. It seems to presume, that the first resale would be for cash, and would certainly produce more than sufficient to satisfy the original purchase-money, with interest and charges. If any person is liable for the deficiency, it must be Morris and Greenleaf, who, by the express provisions of the act, are entitled to the surplus. The legislature intended only to give a summary remedy against the lots, not to impose a new personal responsibility upon any third person for the deficiency of Morris and Greenleaf.

The commissioners, then, having a right to resell but once, and having actually resold to Ross, received from him the purchase-money, and conveyed *the legal estate to his assignee, by a good deed in fee-simple, *63] cannot deny it to be a valid resale, it is not for them to say, that it is not the execution of the power granted them by the statute ; they are estopped by their deed to deny their authority to make that resale. If that resale was valid (which they cannot deny), it must be, because the intermediate contract for resale was void, or at least voidable, at their option ; it is

O'Neale v. Thornton.

also evidence that they had made their election under such option, if they had it. Besides, the legal estate is gone to the assignee of Ross, who is a *bond fide* purchaser for a valuable consideration, without notice of O'Neale's equity, if he ever had any, so that it is not now in the power of the commissioners specifically to execute the contract on their part; and therefore, they cannot claim a compliance with it on his.

The sale to Ross was made by the commissioners, either in *affirmance* or *disaffirmance* of the sale to O'Neale. If it was made in *affirmance* of the sale to O'Neale, then it must have been sold as his property. The commissioners ought to account with him for the proceeds; he would be entitled to the surplus, and the commissioners would be authorized to retain in their hands sufficient of the money produced by such new sale to satisfy all principal and interest due on the second contract (*i. e.* the contract to sell to O'Neale).

But the statute only authorizes the commissioners to retain in their hands sufficient to satisfy the amount due on the first contract (*i. e.* the contract with Morris and Greenleaf), and obliges them to pay over to them the balance. And in conformity with these provisions of the statute, the commissioners always resold as for the default of the first purchasers, Morris and Greenleaf. They never pretended to retain more than the amount due from Morris and Greenleaf upon the first contract, and they always passed to their credit the surplus. The sale to Ross, therefore, could not have been in *affirmance*, but must have been in *disaffirmance* of the contract with O'Neale. *Having, then, by their acts, disavowed that contract, they cannot now set it up again, after they have sold and conveyed away to another the very subject of the contract, and received its value. [*64]

The consideration of the notes has totally failed. The legislature of Maryland might have granted to the commissioners a continuing power to resell upon each default, and each resale might have foreclosed the equity of all preceding parties: but they have not done so, and have used a language wholly inconsistent with such a provision.

Rodney, Attorney-General, and *Jones*, contrà.—The grounds taken by the opposite counsel depend upon the construction of the act of Maryland; and even admitting them to be right in their construction, the notes are not void.

But we contend, they are not right in that construction. The act of assembly authorizes a resale as often as default shall be made by any purchaser. The right to resell, is, *ex vi termini*, co-extensive with the original power to sell. Every resale is a new sale, and within the statute. The terms, "new sale," "first contract," "original purchaser," "second sale," and "first purchaser," are all relative terms. O'Neale is the original purchaser, the first purchaser, as to Ross; and his contract is, as to Ross, the first contract.

The expression in the second section of the act is extensive enough to comprehend all the resales. It is, that "on sales of lots in the said city, by the said commissioners, under terms or conditions of payment being made at a future day," &c.; "and if the purchase-money shall not be paid," &c., "the commissioners may sell the same lots at vendue," &c.

O'Neale v. Thornton

"On sales of lots," means "on any sales of lots;" a resale is as much a sale as the original sale; consequently, if upon a resale, the purchase-*65] *money should not be paid, the commissioners would have as good a right to sell again, as they had for the first default. It was clearly an error in them, to credit the amount of sales to the account of Morris and Greenleaf. But if the commissioners could resell but once, the second resale to Ross was without authority, and void. The sale to O'Neale remains good, and the notes are valid. In that case, nothing passed to Ross, by the deed to him; for the commissioners, being mere trustees, and having no interest, could convey only what they had authority to convey. But if the legal estate has passed to the assignee of Ross, that circumstance does not invalidate the notes. It was the fault of O'Neale himself, for he might have paid the purchase-money according to his contract, and obtained a title. During the period of two years, he could have availed himself of the contract; he might have sold, or otherwise disposed of the lots. Before he can show the notes to be *nuda pacta*, he must show that there never was a consideration for them.

The act meant to give the commissioners the same right as to the sales of lots which a vendor of personal property has in England. If the purchaser does not pay for the goods on the day stipulated, the vendor may sell them again, at the risk of the first vendee; and if they produce less, he may recover from him the difference; so that the sale to Ross may be valid, and yet O'Neale liable for the difference between the sum paid by Ross, and the sum due from Morris and Greenleaf, upon the first contract.

P. B. Key, in reply, observed, that there must not only be a sufficient consideration for the notes, at the time they were given, but there must be a consideration continuing up to the time of trial.

As to the idea of charging O'Neale with the difference between the amount due from Morris and Greenleaf, and the amount paid by Ross, he *66] asked, *who would pay that difference, if there had been, as there might be, according to the construction contended for on the other side, fifteen intermediate purchasers who had all failed to pay their notes? Would all the notes be valid? Or, to which of them should the commissioners resort?

February 15th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was instituted on a promissory note, given by the plaintiffs in error, to the commissioners of the city of Washington, in payment for two lots, originally sold to Morris and Greenleaf, and resold to the plaintiff, in consequence of the failure of the original purchasers to pay the purchase-money. The defendant having also failed to pay the purchase-money, the lots were again resold by the superintendent, who succeeded to the powers of the commissioners, and were conveyed to the assignee of the third purchaser. O'Neale, the defendant in the circuit court, contended, that, by this subsequent sale and conveyance, a total failure of the consideration for which the note was given has been produced by the act of the creditor, and that he is consequently discharged from paying the note. This point having been decided against him, he has brought a writ of error to the judgment of the circuit court, and insists here, as in the court below—

1. That the consideration on which the note was given has totally failed,

O'Neale v. Thornton.

and that this failure is produced by the illegal conduct of the agent for the city.

In support of the judgment of the circuit court it is contended. 1. That the act of the legislature for the state of Maryland, under which both resales purport to have been made, authorizes a third sale on the failure of the purchaser at the second sale to discharge his note. 2. If this be otherwise, that such subsequent sale could not affect the right of O'Neale, whose title would still be good. [*67]

The first point depends on the second section of the act entitled a further supplement to the act "concerning the territory of Columbia, and the city of Washington." This act enables the commissioners to sell at public vendue any lots sold by them on credit, if the purchaser shall fail to pay the purchase-money, thirty days after the same shall become due, and to "retain in their hands sufficient of the money, produced by such new sale, to satisfy all principal and interest due by the first contract, together with the expenses, &c., and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which may have been actually received by them, or under their order, on the second sale, and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns."

It has been argued, that the terms of this section allow a resale so long as the purchaser shall fail to pay the purchase-money, and that every purchaser, so failing, remains liable for his note, notwithstanding such resale. But this court is of opinion, that a single resale only is contemplated by the legislature, and that by such resale, the power given by the act is executed.

The proposition, that a power to resell, if not restricted by the terms in which it is granted, implies a gift of all the power possessed at the original sale, will not be denied; but the court is of opinion, that in this case, the power of reselling is restricted by *the words which confer it. These words are such as, in their literal meaning, apply exclusively to a first [*68] and second sale. The words, "first contract," "original purchaser," and "first purchaser," designate, as expressly and exclusively as any words our language furnishes, the first sale made of the property, and the purchaser at that sale, and no other. It is true, that the natural import of words may be affected by the context, and that where other parts of the statute demonstrate an intent different from that which the words of a particular section of themselves would import, such manifest intent may be admitted, to give to the words employed a less obvious meaning. But, in this statute, no such intent appears.

Men use a language calculated to express the idea they mean to convey. If the legislature had contemplated various and successive sales, so that any intermediate contract or purchaser was within the view of the law-maker, and intended to be affected by the power of resale given to the commissioners, the words employed would have been essentially different from those actually used. We should certainly have found words in the act, applicable to the case of such intermediate contract. But we find no such terms; and the want of them might, in the event of different sales, for different prices, produce difficulties scarcely to be surmounted. No man, intending to draw a law for the purpose of giving the commissioners a continuing power to

O'Neale v. Thornton.

resell as often as default in payment should be made by the purchaser, could express that intention in the language of this act.

It has been argued, by the defendants in error, that every subsequent default would produce the same necessity for reselling again, that was produced by the default of the original purchaser, and that, therefore, the legislature, if their words will permit it, ought to be considered as having given *69] the same remedy. *The influence readily conceded to this argument, in general cases, is much impaired, if not entirely destroyed, by the particular circumstances attending this law.

A contract for 6000 lots was concluded, on the day that this act passed, immediately after its passage. In this large contract, was merged a former contract for 3000 lots made with one of the purchasers in this second contract. It is impossible to reflect on this fact, without being persuaded that the law was agreed upon by the parties to this contract, and was specially adapted to it. The immensity of property disposed of by this sale, furnished motives for legislative aid, by giving a speedy remedy to the commissioners, which might not exist on the resale of particular lots occasioned by any partial default in the purchasers. In consideration of the magnitude of the contract, the lots would, according to the ordinary course of human affairs, rate lower than in cases of a few sold to individuals. Consequently, it could never enter the mind of the commissioners, or of the legislature, that one of these lots resold would not command a much higher price than the estimate made of it in the original contract. We, therefore, find no provision made, in the law, for the event of a lot's selling for a less sum, when resold, than was originally given for it. This furnishes additional inducements to the opinion, that the legislature considered itself as having done as much as the state of the city required, by giving this summary remedy for the default of the first purchaser, and leaving the parties afterwards to the ordinary course of law.

It is, then, the opinion of the court that the act of assembly, under which the superintendent has acted, did not authorize the resale to Ross of the lots which had been previously resold to O'Neale.

2. It remains, then, to inquire whether this sale and conveyance so affects the title of O'Neale, as to produce a failure of the consideration on which *70] the note was given. *In this case, the impropriety which has occurred, in consequence of an agent's misconstruing his powers, is a fact *dehors* the title papers : it is not apparent on the face of the conveyances. They purport to pass a title which is entirely unexceptionable. How far such a conveyance may be valid in law, or how far it may be affected in equity by actual or implied notice to such subsequent purchaser, this court will not now decide. The city, by reselling the property, and conveying it to the purchaser (an act to be justified by no state of things but the nullity of the previous sale), has not left itself at liberty to maintain the continuing obligation of that sale ; and the plaintiff, by setting up this defence, has affirmed the title of the last purchaser.

This court is of opinion, that the city has disabled itself from complying with its contract, and that, on the testimony in the cause, the plaintiff below ought not to have recovered.

Judgment reversed.

King v. Delaware Insurance Co.

This cause came on to be heard, on the transcript of the record from the circuit court for the county of Washington, and was argued by counsel ; all which being seen and considered, this court is of opinion, that the circuit court erred, in refusing to give the opinion prayed by the counsel for the defendants in that court, that, on the whole testimony, if believed, the plaintiffs in that court could not support their action : This court doth, therefore, reverse and annul the judgment rendered in this cause by the said circuit court, and doth remand the cause to that court for a new trial thereof.

*KING v. DELAWARE INSURANCE COMPANY.

[*71

Marine insurance.—Illegal voyage.

The questions whether the voyage be broken up, and whether the master was justified in returning, are questions of law, and the finding thereupon by a jury, is not to be regarded by the court.

The British orders in council of the 11th of November 1807, did not prohibit a direct voyage from the United States to a colony of France.

If, from fear, founded on misrepresentation, the voyage be broken up, the insurers on freight are not liable.¹

King v. Delaware Insurance Co., 2 W. C. C. 300, affirmed.

ERROR to the Circuit Court for the district of Pennsylvania, in an action of covenant, upon a policy of insurance upon the freight of the Venus from Philadelphia to the Isle of France.

The vessel sailed early in December 1807, before the British orders in council of the preceding November were known in the United States. On the afternoon of the 16th of January 1808, while prosecuting her voyage, she was arrested by the British ship of war Wanderer, by whom she was detained until the morning of the 18th, when she was restored to the master, her papers being first indorsed with these words :

“ Ship Venus warned off, the 18th of January 1808, by his majesty’s ship Wanderer, from proceeding to any port in possession of his majesty’s enemies.

EDWARD MEDLEY, 2d Lieut.”

The master was verbally informed by an officer of the Wanderer, that the Isle of France was blockaded, and that the Venus would be a good prize, if she proceeded thither. The master returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the Wanderer, he, on that account, abandoned to the underwriters.

These facts were specially found by the jury, who also found, that “by the interruption, detainment and warning off of the British force, the voyage of the ship Venus was broken up.” They also found, that the Isle of France was not *actually blockaded, from the 6th of December 1807, to the 1st of February 1808. And that by the information and [**72 warning given by the officers of the British fleet to the master of the Venus, he was fully justified in returning to Philadelphia ; and that by reason of the embargo, she was unable to renew the voyage.

¹ And see Jordan v. Warren Ins. Co., 1 Story 342.

King v. Delaware Insurance Co.

By the British orders in council of the 11th of November 1807, as found by the jury, it is ordered, "That all the ports and places of France and her allies, or of any other country at war with his majesty, and all other ports or places in Europe, from which, although not at war with his majesty, the British flag is excluded, and all ports or places in the colonies belonging to his majesty's enemies, shall from henceforth be subject to the same restrictions in point of trade and navigation, with the exceptions herein after mentioned, as if the same were actually blockaded by his majesty's naval forces in the most strict and rigorous manner.

" But although his majesty would be fully justified, by the circumstances and considerations above recited, in establishing such system of restrictions with respect to all the countries and colonies of his enemies, without exception or qualification; yet his majesty, being nevertheless desirous not to subject neutrals to any greater inconvenience than is absolutely inseparable from the carrying into effect his majesty's just determination to counteract the designs of his enemies, and to retort upon his enemies themselves, the consequences of their own violence and injustice; and being yet willing to hope that it may be possible (consistently with that object) still to allow to neutrals the opportunity of furnishing themselves with produce for their own consumption and supply; and even to leave open, for the present, such trade with his majesty's enemies, as shall be carried on directly with the ports of his majesty's dominions, or of his allies, in the manner herein after mentioned.

*73] " His majesty is, therefore, pleased, further to order, *and it is hereby ordered, that nothing herein contained shall extend to subject or capture or condemnation, any vessel, or the cargo of any vessel, belonging to any country, not declared by this order to be subjected to the restrictions incident to a state of blockade, which shall have cleared out with such cargo from some port or place of the country to which she belongs (either in Europe or America, or from some free port in his majesty's colonies, under circumstances in which such trade from such free port is permitted), direct to some port or place in the colonies of his majesty's enemies, or from those colonies direct to the country to which such vessel belongs, or to some free port in his majesty's colonies, in such cases and with such articles as it may be lawful to import into such free port; nor to any vessel, or the cargo of any vessel, belonging to any country not at war with his majesty, which shall have cleared out from some port or place in this kingdom, or from Gibraltar or Malta, under such regulations as his majesty may think fit to prescribe; or from any port belonging to his majesty's allies, and shall be proceeding direct to the port specified in her clearance; nor to any vessel, or the cargo of any vessel, belonging to any country not at war with his majesty, which shall be coming from any port or place in Europe, which is declared by this order to be subject to the restrictions incident to a state of blockade, destined to some port or place in Europe belonging to his majesty, and which shall be on her voyage direct thereto; but these exemptions are not to be understood as exempting from capture or confiscation, any vessel or goods which shall be liable thereto, in respect of having entered or departed from any port or place actually blockaded by his majesty's squadrons or ships of war, or for being enemies' property, or for any other cause than the contravention of this present order.

King v. Delaware Insurance Co.

"And the commanders of his majesty's ships of war, &c., are hereby instructed to warn every vessel which shall have commenced her voyage, prior to any notice of this order, and shall be destined to any port *of France, or of her allies, or of any other country at war with his maj- [*74 esty, or to any port or place from which the British flag as aforesaid is excluded, or to any colony belonging to his majesty's enemies, and which shall not have cleared, as is hereinbefore allowed, to discontinue her voyage, and to proceed to some port or place in this kingdom, or to Gibraltar or Malta ; and every vessel which, after having been so warned, or after a reasonable time shall have been afforded for the arrival of information of this his majesty's order, at any port or place from which she sailed, or which, after having notice of this order, shall be found in the prosecution of any voyage, contrary to the restrictions contained in this order, shall be captured, and, together with her cargo, condemned as lawful prize to the captors."

The Venus returned to the Delaware on the 21st of February 1808, and, on the 22d, the following letter of abandonment was written by Vanuxem & Clark, the agents of the plaintiff :

Thomas Fitzsimmons, Esq.

Sir :—The ship Venus, Captain King, bound from hence to the Isle of France, having had the register indorsed, and warned by the British ship Wanderer, from proceeding to her destination, has returned to this port ; by which circumstance her voyage is broken up. We do, therefore, hereby abandon to your office the freight insured by policy of 5th December last, for \$6000, on freight out valued at \$8000. Yours, VANUXEM & CLARK.

Thomas Fitzsimmons, Esq., Pres. Del. Ins. Co.

The jury further found, that the possession was not *as prize, but merely to prevent the Venus from prosecuting her voyage to the Isle [*75 of France.

Upon this special verdict, judgment, in the court below, was rendered for the defendants.

Ingersoll, jun., for plaintiff in error, contended, 1. That no abandonment at all was necessary in this case. 2. That the abandonment was sufficient. 3. That this was a loss within the policy. 4. That the justification of the master, from all the circumstances of the case, was a matter of fact, to be decided by the jury, and that their finding upon that point was conclusive. 5. If the justification be not a matter of fact for the jury, yet the facts found by the jury are, in law, a justification.

1 and 2. Upon the question of abandonment he cited 2 Emerig. 174, 175 ; Marsh. 480 (5th edit.) 148 ; Le Guidon, c. 7 ; Rocceus, in notis, 44, 95 ; 3 Atk. 195 ; 1 T. R. 608 ; Park 171, 192, 239 ; Marsh. 517, 559 ; 2 Valin 99 ; Pothier, n. 128 ; 1 Johns. 181 ; Emerig. 197 ; 1 T. R. 304 ; Millar 308, 282 ; 2 Burr. 1209 ; Park 143 ; *Lucena v. Craufurd*, 5 Bos. & Pul. 310.

Upon the 3d, 4th and 5th points, which included the question of justification of the master in returning to Philadelphia, he cited *The Ship Hope*, 1 Doug. 219 ; Marsh. 498, 505 ; *The Ship Grace*, Park 168 ; *The Ship Tar-tar*, 3 Bos. & Pul. 434 ; 3 Caines 188 ; 1 Johns. 301 ; 5 Bos. & Pul. 434 ; 2 Johns. 264 ; 1 Rob. 146 (Amer. edit.) ; *Blackenhagen v. London Assurance Company*, 1 Camp. 454. And the case of *Dederer v. Delaware Insurance*

King v. Delaware Insurance Co.

Company, in the circuit court for the district of Pennsylvania, in April, 1807, (a) to show that the justification *of the master was matter of fact to be left to the jury.

And to show that in point of law the master was justified in returning, he cited *Goss v. Withers*, 2 Burr. 696; *Marsh.* 486; *Roccus*, not. 64; *Rhinelander v. Pennsylvania Ins. Co.*, 4 Cr. 29.

That the abandonment was sufficient, and related back to the time of arrest, when the loss was total. 1 *Emerig.* 440; *Marsh.* 519; *Marshall v. Delaware Ins. Co.* 4 Cr. 202, which case has been confirmed in England, in *B. R.*; *Bainbridge v. Nielson*, 10 East 329; 2 *Valin* 123; 1 *Emerig.* 537, 538; *Marsh.* 434; *The Hiram*, 3 Rob. 180; *Scott v. Libby*, 2 Johns. 336; and *Barker v. Cheviott*, *Ibid.* 352; *Curling v. Long*, 1 Bos. & Pul. 634; *Cook v. Jennings*, 7 T. R. 381; *Miles v. Fletcher*, 1 Doug. 219; *Brewster v. Kitchell*, 1 Salk. 198; *Case of the Columb*, 1 *Emerig.* c. 12, § 31, p. 542-4; *Roccus*, not. 63; 1 Johns. 301; *Symonds v. Union Ins. Co.* 4 Dall. 417; *Barker v. Blakes*, 9 East 283; 1 *Emerig.* 508; *Schmidt v. United Ins. Co.* 1 Johns. 249; *Driscoll v. Bovil*, 1 Bos. & Pul. 200; *Driscoll v. Passmore*, *Ibid.* 218.

Binney and Hopkinson, contrâ.—The assured, at the time of abandonment, must state a good cause of abandonment. The only causes assigned by the plaintiff are those stated in the special verdict, none of which are sufficient.

The special verdict finds, matters of law, which ought not to have been submitted to the jury, viz., that the voyage was broken up, and that the master was justified in returning. He was opposed by no physical or legal impediment. The jury have found that the arrest was not as prize, but only to prevent the prosecution of the voyage. The exemption from the general operation of the orders in council of the 11th of November, embraces the case of a vessel sailing from a neutral port direct to an enemy's colony. The words are: "Nothing herein contained shall *extend to subject to capture or condemnation any vessel," "belonging to any country not declared by this order to be subjected to the restrictions incident to a state of blockade, which shall have cleared out" "from some port" "of the country to which she belongs," "direct to some port" "in the colonies of his majesty's enemies." The expression "shall have," must, in grammatical construction, allude to a time which was future when the order was passed, and also to a time which should have passed, before the arrival of that future time. "Which shall have cleared out." That is, which shall *then* have cleared out. When? At the time of the seizure. If, at the time of seizure, the vessel shall have cleared out from a neutral port, direct to an enemy's colony, she is within the exception to the general order. If it had been intended to except only those which had cleared out before the 11th of November, the date of the order, the expression would have been, which have cleared out, &c.

If the *Venus* was within the exception to the order, the officer of the *Wanderer* had no right to prohibit her from proceeding on her voyage; and his prohibition was no justification to the master in returning to Philadelphia.

King v. Delaware Insurance Co.

But even if the order did include this vessel, yet the prohibition was no justification to the master; because the Isle of France was only nominally, not actually blockaded. A constructive blockade, if it be a peril insured against, must be considered as within the denomination of restraints, but, from the terms of the policy, it must be a restraint which comes to the hurt, damage or detriment of the thing insured. It must, therefore, have been either an actual or a legal restraint. A constructive blockade is not known to the law of nations; our courts reject it. It is not a legal restraint. 2 Caines 11; 1 Johns 253.

If the circumstances of the present case are a justification, *then [*_78 every ill-founded apprehension of a timorous man may justify an abandonment. There must be peril, in point of fact. The misapprehension of a weak man is not sufficient. 3 Bos. & Pul. 392; 5 Esp. 50; Park 226. The master ought to have proceeded, that he might himself see whether the port was actually blockaded, or not. He ought not to have depended upon the information he received from the Wanderer.

Harper, in reply.—The master was under a moral incapacity to proceed on his voyage, and was, therefore, justified in returning. The policy of Great Britain was to interdict this neutral commerce; it was the great object of the order of the 11th of November 1807. The words shall have cleared out, mean, shall have now cleared out, i. e., before the date of the order. It is immaterial, whether this order was warranted by the law of nations, because it was still within the peril of restraint of princes. A probability of capture and condemnation was sufficient. Such a reasonable apprehension as a man of firmness might indulge.

February 17th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit was instituted on a policy insuring the freight of the Venus, from Philadelphia to the Isle of France. The vessel sailed, early in December 1807, before the British orders in council, of the preceding November, were known in the United States. On the afternoon of the 16th of January 1808, while prosecuting her voyage, she met the British ship of war Wanderer, by whom she was arrested and detained, until the morning of the 18th, when she was restored to the master, her papers being first indorsed with these words,

“Ship Venus warned off, the 18th of January 1808, by H. M. S. Wanderer, from proceeding *to any port in possession of his majesty’s enemies. [*_79 Edward Medley, second lieutenant.

The master was verbally informed by an officer of the Wanderer, that the Isle of France was blockaded, and that the Venus would be a good prize, if she proceeded thither. The master returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the Wanderer, he, on that account, abandoned to the underwriters.

The principal question arising on this case is, was the master of the Venus justified in returning to Philadelphia, after having proceeded about 1000 miles on his voyage, either by the indorsement on his papers, or the verbal information given by an officer of the Wanderer?

A point preliminary to the examination of this question on its merits, has

King v. Delaware Insurance Co.

been made by the plaintiff in error. The jury have found, that "by the interruption, detainment, and warning off of the British force, the voyage of the said ship Venus was broken up." After stating the verbal information given by the British officer, respecting the blockade of the Isle of France, is this further finding, "We find, in consequence thereof, that the said Elisha King was fully justified in returning to the port of Philadelphia." These findings, it is urged, conclude the court, and render this special verdict equivalent to a general one.

But this court is not of that opinion. It has been truly said, that finding the breaking up of the voyage finds nothing. The question recurs, was [the voyage broken up by one of the perils insured against, or by *the fault of the master? The answer to this question determines the liability of the underwriters. It has been also truly said, that the question of justification is a question of law, not of fact. If, as in this case, the jury find the fact specially, and draw the legal conclusion that the fact amounts to a justification, the court is not bound by that conclusion. The case, then, is open to examination on its real merits, unaffected by the particular findings which have been noticed.

In proceeding to inquire whether the circumstances which actually occurred, justified the master of the Venus in returning to Philadelphia, it becomes important to ascertain the real hazard of prosecuting his voyage. This essentially depends on the construction of the British orders of council issued in November 1807. By the plaintiff in error, it is insisted, that these orders extend to the direct trade between a neutral port and the colony of an enemy. In support of this construction, a very acute and elaborate criticism has been bestowed on those orders, which appears to the court merely to furnish additional proof of the imperfection of all human language. The intent of the orders to exclude from their operation this direct trade, an intent alike manifested by the context, and by the particular words forming the exception, the universal understanding of both countries, which has been, on more than one occasion, publicly and officially expressed, are too conclusive on this point, to render it necessary that the court should proceed to review that analysis of this document, which has been so well made at the bar.

According to the construction contended for by the plaintiffs in error, an exception professedly made to mitigate the rigor of the general rule, "and still to allow to neutrals the opportunity of furnishing themselves with colonial produce for their own consumption and supply," would be more rigorous than the rule itself, and would interdict that trade by which [they were to be supplied with this produce for their own use, with as jealous circumspection as the trade professedly prohibited by the general rule.

It is, then, the clear and unanimous opinion of the court, that the words "shall have," which are used in the exception, relate as well to the time of capture, as to the time of issuing the orders, and that a direct voyage from the United States to a colony of France, was not prohibited.

It being found that the Isle of France was not actually blockaded, and the orders not prohibiting the voyage, it remains to inquire, whether the apprehension excited by the warning, or by the verbal communication of a British officer, justified the return of the Venus to Philadelphia. It has

Lewis v. Harwood.

been very truly observed, that, in this case, the Venus was not physically incapacitated from prosecuting her voyage. With equal truth, has it been observed, that there was no legal impediment to her proceeding, because the voyage was not prohibited by the orders of November 1807; and consequently, the indorsement on her papers would not have increased the danger.

There did not, then, at the time the voyage was abandoned, exist, either in fact or in law, the restraint or detention, against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure. Whether this might be justified, under any circumstances, it is unnecessary to determine. But the court is of opinion, that the circumstances of this case did not justify it. The Venus might have proceeded, and ought to have proceeded, until she could obtain further information. It would be dangerous in the extreme, if any false intelligence, received on a voyage, *might justify a [**82 master in acting as if that intelligence were true.

The case of *Blackenhagen v. The London Assurance Company*, has a strong bearing on this case, and though that was a decision at *nisi prius*, it is entitled to all the respect which is due to the court of common pleas. After the same opinion had been successively given by Lord ELLENBOROUGH, and by Sir JAMES MANSFIELD, it was affirmed by the whole court, and the jury having found against the opinion of the judge, a new trial was granted.

The court gives no opinion on the question how far the underwriters would have been liable, had the orders of council prohibited the trade to the Isle of France. This decision is not intended in any manner to affect that question.

Judgment affirmed, with costs.

LEWIS v. HARWOOD.

Assignment of bonds

A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia.

ERROR to the Circuit Court for the district of Virginia, in an action of debt upon a bond, dated February 3d, 1784, the condition of which was, that if the obligor should pay to William Whetcroft, his attorney, heirs, executors, administrators or assigns, the sum of 3000*l.* current money of Virginia, on or before the 1st of January 1785, then the obligation to be void. Provided, that if the obligor, on application by the obligee, at the town of Fredericksburg, on or after the 1st of January 1785, should pay to the obligee 3000*l.* in officers' certificates of a certain description, or should pay the interest of six per cent. from the date of the bond, on such certificates, if not paid, and should annually and punctually pay the said six per *cent. [**83 when applied to, as before mentioned, in doing of which the condition of the bond was to be dischargeable by payment of the 3000*l.* officers' certificates, otherwise, the bond was to have its full force and effect.

Upon the pleas of payment, and conditions performed, the verdict and judgment below were for the plaintiff. The defendant brought his writ of error.

Lewis v. Harwood.

Terrell and *Swann*, for the plaintiff in error, contended, that the bond was not assignable, under the act of assembly of Virginia, and therefore, the plaintiff below, who was the assignee, could not recover in his own name. The act of 1748 applies only to a bond given for a debt. And by a subsequent act, it is explained to mean a money debt. The subsequent act makes tobacco bonds assignable.

In the case of *Henderson v. Hepburn*, 2 Call 232, 238, it is decided, that an assignee cannot maintain an action of debt in his own name upon a bond with a collateral condition. *Craig v. Craig*, 1 Call 483. The condition of the bond is either to pay 3000*l.* by a certain day, or to pay 3000*l.* in certificates, or to pay interest on the certificates.

A bond is not assignable, unless it be for a debt so certain, as not to require the aid of a jury to assess the damages, or to ascertain the sum due.

February 24th, 1810. LIVINGSTON, J., delivered the opinion of the court, *84] as follows:—On the 3d day of February 1784, the *plaintiff executed his bond to William Whetcroft, in the penal sum of 6000*l.* to which there is a condition in the following words: “The condition of the above obligation is such, that if the said John Lewis shall well and truly pay to the said William Whetcroft the full sum of three thousand pounds, current money of Virginia, on or before the first day of January 1785, then this obligation to be void. Provided, and it is to be understood, that in case the said Lewis, on application by the said Whetcroft to him, in the town of Fredericksburg, on or after the said first day of January, shall pay unto the said William, or his attorney, the sum of three thousand pounds in officers’ certificates, issued under an act of assembly passed November 1781, for pay or arrearages of pay and depreciation, or shall well and truly pay the interest of six per centum from the date hereof, on the said certificates, if not paid, and shall moreover annually and punctually pay the said six per cent. when applied to as before mentioned, in doing of which, the condition of this bond is dischargeable by payment of the said three thousand pounds officers’ certificates; otherwise, the bond shall have its full force and effect.

This bond was assigned to the defendant, on the 3d of August 1790, and an action at law was brought on it, in the name of the assignee, in the circuit court of the United States for the district of Virginia, when judgment was rendered for the defendant. On this judgment, a writ of error has been sued out, and the plaintiff alleges that the same should be reversed, because the bond on which this action is brought is not assignable under the laws of Virginia, so as to enable the assignee to prosecute at law in his own name. Other causes of error have been assigned, but the opinion of the court being with the plaintiff on the first point, it will not be necessary to take any notice of the objections which have been made to the pleadings, or to the imperfect finding of the jury.

*A bond not being assignable at common law, the present question must turn altogether on the statutes of Virginia. It seems to have been for a long time doubted, after passing the act of 1748, c. 27, whether any but bonds conditioned to pay money or tobacco were assignable. That question was, however, at last settled by the court of appeals, in the case of *Henderson v. Hepburn*, in which it was decided, that a bond with a collateral condition was not, within the meaning of this act, assign-

Riddle v. Mandeville.

able. With this decision the court not only feels no inclination to interfere, but thinks it a fair and just exposition of the acts which had then been passed on this subject. The bonds intended by the legislature were most clearly such as were to become void on the payment of a sum certain, and where no intervention or assessment of a jury was necessary. Bonds which require particular breaches to be assigned, damages on which were to be estimated or liquidated by a jury, do not appear to have been contemplated.

It being then settled, that bonds with collateral conditions were not assignable under the laws in force at the time of the making of this assignment, it only remains to ascertain the true character of the condition of the bond on which this action is brought.

Although, by payment of 3000*l.* on or before a certain day, the obligor might have discharged himself from the penalty, it was part of the condition that, on the application of the obligee, by a certain day, a payment in certain certificates which were not money, might be substituted. This created an alternative by which the penalty might be discharged, either by money or officers' certificates; and although the consent of both parties might be necessary to a payment in the latter way, still, as it made part of the written contract, the court cannot but perceive that, on a certain contingency, it was to be considered as a bond on which it might, as it did, become necessary to assign breaches and call in a jury to assess damages. If we look at the record, we shall find the *parties, their counsel and the jury treating [*86 it as a bond of this description.

It is the opinion, therefore, of the court, that this bond was not assignable, under the laws of Virginia, and that the judgment of the circuit court for the district of Virginia must be reversed, and judgment on the verdict be arrested.

Judgment reversed.

RIDDLE & Co. v. MANDEVILLE & JAMESON.*Mandate.—Costs in error.*

The court below, upon a mandate, on reversal of its judgment, may award execution for the costs of the appellant in that court.

A MANDATE had been issued upon the reversal of the decree in this case at the last term, in which, "this court, proceeding to give such decree as the said circuit court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of \$1500, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due, you are hereby commanded that such execution and proceedings be had on the said decree of the said supreme court, as, according to equity and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding." Nothing having been said respecting the costs, the court below had not issued execution for the costs of the appellant.

E. J. Lee moved the court for a further mandate to the court below, to award the costs of that court.

MARSHALL, Ch. J.—The court below is always competent to award costs in a chancery suit, in that court, and in case of a mandate, may issue execution therefor.

*FLETCHER v. PECK.

Pleadings in covenant.—Constitutional law.—Validity of statute.—Obligation of contract.—Georgia.—Indian title.

If the breach of covenant assigned be, that the state had no authority to sell and dispose of certain land, it is not a good plea in bar, to say that the governor was legally empowered to sell and convey the premises, although the facts stated in the plea as inducement, are sufficient to justify a direct negative of the breach assigned.

It is not necessary, that a breach of covenant be assigned in the very words of the covenant. It is sufficient, if it show a substantial breach.

The court will not declare a law to be unconstitutional; unless the opposition between the constitution and the law be clear and plain.¹

The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.²

When a law is in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

A party to a contract cannot pronounce its own deed invalid, although such party be a sovereign state.

A grant is a contract executed.

A statute, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.

The proclamation of the King of Great Britain, in 1763, did not alter the boundaries of Georgia. The nature of the Indian title is not such as to be absolutely repugnant to seisin in fee on the part of the state.

ERROR to the Circuit Court for the district of Massachusetts, in an action of covenant, brought by Fletcher against Peck.

The first count of the declaration stated, that Peck, by his deed of bargain and sale, dated the 14th of May 1803, in consideration of \$3000, sold and conveyed to Fletcher, 15,000 acres of land, lying in common and undivided, in a tract described as follows: beginning on the river Mississippi,

¹ Dartmouth College *v.* Woodward, 4 Wheat. 625. The incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases, or supposed consequences; it must be clear, decided, and inevitable; such as presents a contradiction at once to the mind, without straining either by forced meanings, or to remote consequences. Livingston *v.* Moore, 7 Pet. 663; Falconer *v.* Campbell, 2 McLean 195. And see Ogden *v.* Saunders, 12 Wheat. 294; Knox *v.* Lee, 12 Wall. 531; Livingston County *v.* Darlington, 101 U. S. 410; Commonwealth *v.* Smith, 4 Binn. 123; Moore *v.* Houston, 3 S. & R. 169; Chicago, Danville and Vincennes Railroad Co. *v.* Smith, 62 Ill. 268; Ex parte McCollum, 1 Cow. 550; Cooley on Constitutional Limitations (4th Ed.) 220-25, and cases there cited.

² If a particular act of legislation does not conflict with any of the limitations or restraints of the constitution, it is not in the power of the

courts to arrest its execution, however unwise its provisions may be, or whatever the motives may have been which led to its enactment. There is room for much bad legislation and misgovernment within the pale of the constitution; but whenever this happens, the remedy which the constitution provides, by the opportunity for frequent renewals of the legislative bodies, is far more efficacious than any that can be afforded by the judiciary. The courts cannot impute to the legislature any other than public motives for their acts. If a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion, that the professed motives for passing it, are not the real ones. DENIO, C. J., in People *v.* Draper, 15 N. Y. 545. And see People *v.* Shepard, 36 Id. 289; Turnpike Road Co. *v.* Ebbets, 3 Edw. Ch. 374, Cooley on Constitutional Limitations (4th Ed.) 226-7, and cases cited.

Fletcher v. Peck.

where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude, a due east course, to the Tombigbee river, thence up the said Tombigbee river, to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude, a due west course, to the Mississippi ; thence down the said river, to the place of beginning ; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps, by deed, dated the 27th of February 1796, and of which the said Phelps conveyed four-fifths to Benjamin Hichborn and the said Peck, by deed, dated the 8th of December 1800 ; the said tract of 500,000 acres being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed, dated the 23d of September 1795, and is parcel of that tract which James Gunn, Mathew McAllister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet and Wade Hampton, by deed, dated 22d of August 1795, conveyed to the said James Greenleaf ; the same being part of that tract which was granted by letters-patent under the great seal of the state of Georgia, and the signature of George Matthews, Esq., governor of that state, dated the 13th of January 1795, to the said James Gunn and others, under the name of James Gunn, Mathew McAllister and George *Walker and their associates, and their heirs and assigns, in fee-simple, [*88 under the name of the Georgia Company ; which patent was issued by virtue of an act of the legislature of Georgia, passed the 7th of January 1795, entitled "an act supplementary to an act for appropriating part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned, and declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes." That Peck, in his deed to Fletcher, covenanted "that the state of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof (entitled as aforesaid), legally seised in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. And that the legislature of the said state, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act. And that the governor of the said state had lawful authority to issue his grant aforesaid, by virtue of the said act. And further, that all the title which the said state of Georgia ever had in the afore-granted premises had been legally conveyed to the said John Peck, by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the state of Georgia, and finally vested in the said Peck, had been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said state of Georgia." The breach assigned in the first count was, that at the time the said act of 7th of January 1795, was passed, "the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act."

The 2d count, after stating the covenants in the deed as stated in the first count, averred, that at Augusta, in the said state of Georgia, on the 7th day of January 1795, the said James Gunn, Mathew McAllister *and George Walker promised and assured divers members of the legislature of the said state, then duly and legally sitting in general assembly of

Fletcher v. Peck.

the said state, that if the said members would assent to and vote for the passing of the act of the said general assembly, entitled as aforesaid, the same then being before the said general assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands, which they the said Gunn, McAllister and Walker, and their associates, should purchase of the said state, by virtue of and under authority of the same law: and that divers of the said members to whom the said promise and assurance was so made as aforesaid, were unduly influenced thereby, and under such influence, did then and there vote for the passing the said bill into a law; by reason whereof, the said law was a nullity, and from the time of passing the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; and that the title which the said state of Georgia had in the afore-granted premises, at any time whatever, was never legally conveyed to the said Peck, by force of the conveyances aforesaid."

The third count, after repeating all the averments and recitals contained in the second, further averred, that after the passing of the said act, and of the execution of the patent aforesaid, the general assembly of the state of Georgia, being a legislature of that state subsequent to that which passed the said act, at a session thereof, duly and legally holden at Augusta, in the said state, did, on the 13th of February 1796, because of the undue influence used as aforesaid, in procuring the said act to be passed, and for other causes, pass another certain act in the words following, that is to say, "An act declaring null and void a certain usurped act passed by the last legislature of this state, at Augusta, the 7th day of January 1795, under the pretended title of 'an act supplementary to an act entitled an act for appropriating a part of the unlocated *territory of the state for the payment of the late state troops, and for other purposes therein mentioned, declaring the right of this state to the unappropriated territory thereof for the protection of the frontiers, and for other purposes,' and for expunging from the public records the said usurped act, and declaring the right of this state to all lands lying within the boundaries therein mentioned :" By which, after a long preamble, it is enacted, "That the said usurped act passed on the 7th of January 1795, entitled, &c., be, and the same is hereby declared, null and void, and the grant or grants, right or rights, claim or claims, issued, deduced or derived therefrom, or from any clause, letter or spirit of the same, or any part of the same, is hereby also annulled, rendered void and of no effect; and as the same was made without constitutional authority, and fraudulently obtained, it is hereby declared of no binding force or effect on this state, or the people thereof, but is and are to be considered, both law and grant, as they ought to be, *ipso facto*, of themselves, void, and the territory therein mentioned is also hereby declared to be the sole property of the state, subject only to the right of treaty of the United States to enable the state to purchase, under its pre-emption right, the Indian title to the same." The 2d section directed the enrolled law, the grant, and all deeds, contracts, &c., relative to the purchase, to be expunged from the records of the state, &c. The 3d section declared, that neither the law nor the grant, nor any other conveyance or agreement relative thereto, shall be received in evidence in any court of law or equity in the state so far as to establish a right to the territory, or any part thereof, but they may be received in evi-

Fletcher v. Peck.

dence in private actions between individuals for the recovery of money paid upon pretended sales, &c. The 4th section provided for the repayment of money, funded stock, &c., which may have been paid into the treasury, provided it was then remaining *therein, and provided the repayment should be demanded within eight months from that time. The 5th [*91] section prohibited any application to congress, or the general government of the United States, for the extinguishment of the Indian claim; and the 6th section provided for the promulgation of the act. The count then assigned a breach of the covenant in the following words, viz: "And by reason of the passing of the said last-mentioned act, and by virtue thereof, the title which the said Peck had, as aforesaid, in and to the tenements aforesaid, and in and to any part thereof, was constitutionally and legally impaired, and rendered null and void."

The 4th count, after reciting the covenants as in the first, assigned as a breach, "that at the time of passing of the act of the 7th of January 1795, the United States of America were seised in fee-simple of all the tenements aforesaid, and of all the soil thereof, and that, at that time, the State of Georgia was not seised in fee-simple of the tenements aforesaid, or of any part thereof, nor of any part of the soil thereof, subject only to the extinguishment of part of the Indian title thereon."

The defendant pleaded four pleas, viz: 1st plea. As to the breach assigned in the first count, he said, that on the 6th of May 1789, at Augusta, in the state of Georgia, the people of that state, by their delegates, duly authorized and empowered to form, declare, ratify and confirm a constitution for the government of the said state, did form, declare, ratify and conform such constitution, in the words following: [Here was inserted the whole constitution, the 16th section of which declares, that the general assembly shall have power to make all laws and ordinances *which they shall deem necessary and proper for the good of the state, which shall not be repugnant to this constitution.] The plea then averred, that until and at the ratification and confirmation aforesaid of the said constitution, the people of the said state were seised, among other large parcels of land and tracts of country, of all the tenements described by the said Fletcher in his said first count, and of the soil thereof, in absolute sovereignty, and in fee-simple (subject only to the extinguishment of the Indian title to part thereof); and that upon the confirmation and ratification of the said constitution, and by force thereof, the said state of Georgia became seised in absolute sovereignty, and in fee-simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid; the same being within the territory and jurisdiction of the said state, and the same state continued so seised in fee-simple, until the said tenements and soil were conveyed, by letters-patent, under the great seal of the said state, and under the signature of George Matthews, Esq., governor thereof, in the manner and form mentioned by the said Fletcher in his said first count. And the said Peck further said, that on the 7th of January 1795, at a session of the general assembly of the said state, duly holden at Augusta, within the same, according to the provisions of the said constitution, the said general assembly, then and there possessing all the powers vested in the legislature of the said state, by virtue of the said constitution, passed the act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which act is in the words following,

Fletcher v. Peck.

that is to say, "An act supplementary," &c. [Here was recited the whole act, which, after a long preamble, declared the jurisdictional and territorial rights, and the fee-simple to be in the state, and then enacted, that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, "The Georgia Company," "The Georgia Mississippi Company," "The Upper Mississippi Company," and "The Tennessee Company."] The tract *93] ordered to be sold to James Gunn and *others (the Georgia Company) was described as follows: "All that tract or parcel of land, including islands, situate, lying and being within the following boundaries; that is to say, beginning on the Mobile bay, where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay, to the mouth of lake Tensaw; thence up the said lake Tensaw, to the Alabama river, including Curry's, and all other islands therein; thence up the said Alabama river, to the junction of the Coosa and Oakfushee rivers; thence up the Coosa river, above the big shoals, to where it intersects the latitude of 34 degrees north of the equator; thence, a due west course, to the Mississippi river; thence, down the middle of the said river, to the latitude 32 deg. 40 min.; thence, a due east course, to the Don or Tombigbee river; thence, down the middle of the said river, to its junction with the Alabama river; thence, down the middle of the said river, to Mobile bay; thence, down the Mobile bay, to the place of beginning. Upon payment of \$50,000, the governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, being \$200,000, payable on the first of November 1795. The plea then averred, that all the tenements described in the first count were included in, and parcel of, the lands in the said act to be sold to the said Gunn, McAllister and Walker and their associates, as in the act is mentioned. And that by force and virtue of the said act, and of the constitution aforesaid, of the said state, the said Matthews, governor of the said state, was fully and legally empowered to sell and convey the tenements aforesaid, and the soil thereof, subject as aforesaid, in fee-simple, by the said patent, under the seal of the said state, and under his signature, according to the terms, limitations and conditions in the said act mentioned.

*94] And all this he is ready to verify; wherefore, &c. *To this plea, there was a general demurrer and joinder.

2d plea. To the second count, the defendant, "protesting that the said Gunn, McAllister and Walker did not make the promises and assurances to divers members of the legislature of the said state of Georgia, supposed by the said Fletcher in his second count, for plea saith, that until after the purchase by the said Greenleaf, as is mentioned in the said second count, neither he, the said defendant, nor the said Prince, nor the said Greenleaf, nor the said Phelps, nor the said Hichborn, nor either of them, had any notice nor knowledge that any such promises and assurances were made by the said Gunn, McAllister and Walker, or either of them, to any of the members of the legislature of the said state of Georgia, as is supposed by the said Fletcher in his said second count, and this he is ready to verify," &c. To this plea also, there was a general demurrer and joinder.

3d plea to the third count was the same as the second plea, with the addition of an averment, that Greenleaf, Prince, Phelps, Hichborn and the defendants were, until and after the purchase by Greenleaf, on the 22d of

Fletcher v. Peck.

August 1795, and ever since had been, citizens of some of the United States other than the state of Georgia. To this plea also, there was a general demurrer and joinder.

4th plea. To the fourth count, the defendant pleaded, that at the time of passing the act of the 7th of January 1795, the state of Georgia was seized in fee-simple of all the tenements and territories aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and of this he put himself on the country, and the plaintiff likewise.

*Upon the issue joined upon the fourth plea, the jury found the [*95 following special verdict, viz : That his late majesty, Charles the second, King of Great Britain, by his letters patent, under the great seal of Great Britain, bearing date the 30th day of June, in the 17th year of his reign, did grant unto Edward, Earl of Clarendon, George, Duke of Albermarle, William, Earl of Craven, John Lord Berkeley, Antony Lord Ashby, Sir George Carteret, Sir John Colleton and Sir William Berkeley, therein called lords proprietors, and their heirs and assigns, all that province, territory or tract of ground, situate, lying and being in North America, and described as follows : extending north and eastward as far as the north end of Carahtuke river or gullet, upon a straight westerly line to Wyonoahe creek, which lies within or about the degrees of thirty-six and thirty minutes of northern latitude, and so west, in a direct line, as far as the South Seas, and south and westward as far as the degrees of twenty-nine inclusive, northern latitude, and so west, in a direct line, as far as the South Seas (which territory was called Carolina), together with all ports, harbors, bays, rivers, soil, land, fields, woods, lakes, and other rights and privileges therein named ; that the said lords proprietors, grantees aforesaid, afterwards, by force of said grant, entered upon and took possession of said territory, and established within the same many settlements, and erected therein fortifications and posts of defence.

And the jury further find, that the northern part of the said tract of land, granted as aforesaid to the said lords proprietors, was afterwards created a colony by the King of Great Britain, under the name of North Carolina, and that the most northern part of the thirty-fifth degree of north latitude was then and ever afterwards the boundary and line between North Carolina and South Carolina, and that the land, described in the plaintiff's declaration, is situate in that part of said tract, formerly called Carolina, which was afterwards a colony called South Carolina, as aforesaid ; that afterwards, on the 26th day of July, in the *96 3d year of the reign of his late majesty, George the second, King of Great Britain, and in the year of our Lord 1729, the heirs or legal representatives of all the said grantees, except those of Sir George Carteret, by deed of indenture, made between authorized agents of the said King George the second, and the heirs and representatives of the said grantees, in conformity to an act of the parliament of said kingdom of Great Britain, entitled, "An act for establishing an agreement with seven of the lords proprietors of Carolina, for the surrender of their title and interest in that province to his majesty," for and in consideration of the sum of 22,500*l.* of the money of Great Britain, paid to the said heirs and representatives of the said seven of the lords proprietors, by the said agent of the said king, sold and surrendered to his said majesty, King George the second, all their right of soil, and

Fletcher v. Peck.

other privileges to the said granted territory ; which deed of indenture was duly executed and was enrolled in the chancery of Great Britain, and there remains in the chapel of the rolls. That afterwards, on the 9th day of December 1729, his said majesty, George the second, appointed Robert Johnson, Esq., to be governor of the province of South Carolina, by a commission under the great seal of the said kingdom of Great Britain ; in which commission the said Governor Johnson was authorized to grant lands within the said province, but no particular limits of the said province is therein defined.

And the jury further find, that the said Governor of South Carolina did exercise jurisdiction in and over the said colony of South Carolina, under the commission aforesaid, claiming to have jurisdiction, by force thereof, as far southward and westward as the southern and western bounds of the afore-mentioned grant of Carolina, by King Charles the second, to the said lords proprietors, but that he was often interrupted therein and prevented therefrom in the southern and western parts of said grants by the public enemies of the King of Great Britain, who, at divers times, *had
*97] actual possession of the southern and western parts aforesaid. That afterwards, the right honorable Lord Viscount Percival, the honorable Edward Digby, the honorable George Carpenter, James Oglethorpe, Esq., with others, petitioned the lords of the committee of his said majesty's privy council for a grant of lands in South Carolina, for the charitable purpose of transporting necessitous persons and families from London to that province, to procure there a livelihood by their industry, and to be incorporated for that purpose ; that the lords of the said privy council referred the said petition to the board of trade, so called, in Great Britain, who, on the 17th day of December, in the year of our Lord 1730, made report thereon, and therein recommended that his said majesty would be pleased to incorporate the said petitioners as a charitable society, by the name of "The Corporation for the purpose of establishing Charitable Colonies in America, with perpetual succession." And the said report further recommended, that his said majesty be pleased "to grant to the said petitioners and their successors for ever, all that tract of land in his province of South Carolina, lying between the rivers Savannah and Alatamaha, to be bounded by the most navigable and largest branches of the Savannah, and the most southerly branch of the Alatamaha." And that they should be separated from the province of South Carolina, and be made a colony independent thereof, save only in the command of their militia. That afterwards, on the 22d day of December 1731, the said board of trade reported further to the said lords of the privy council, and recommended that the western boundary of the new charter of the colony, to be established in South Carolina, should extend as far as that described in the ancient patents granted by King Charles the second, to the late lords proprietors of Carolina, whereby that province was to extend westward in a direct line as far as the South Seas. That afterwards, on the 9th day of June, in the year of our Lord 1732, his
*98] said majesty, George the *second, by his letters-patent, or royal charter, under the great seal of the said kingdom of Great Britain, did incorporate the said Lord Viscount Percival and others, the petitioners aforesaid, into a body politic and corporate, by the name of "The trustees for establishing the colony of Georgia, in America, with perpetual suc-

Fletcher v. Peck.

sion ;" and did, by the same letters-patent, give and grant in free and common socage, and not *in capite*, to the said corporation and their successors, seven undivided parts (the whole into eight equal parts to be divided) of all those lands, countries and territories, situate, lying and being in that part of South Carolina, in America, which lies from a northern stream of a river there commonly called the Savannah, all along the sea-coast to the southward, unto the most southern branch of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers, respectively, in direct lines, to the South Seas, and all the lands lying within said boundaries, with the islands in the sea, lying opposite to the eastern coast of the same, together with all the soils, grounds, havens, bays, mines, minerals, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminentures within the said territories. That afterwards, in the same year, the right honorable John Lord Carteret, Baron of Hawnes, in the county of Bedford, then Earl Granville, and heir of the late Sir George Carteret, one of the grantees and lords proprietors aforesaid, by deed of indenture between him and the said trustees for establishing the colony of Georgia, in America, for valuable consideration therein mentioned, did give, grant, bargain and sell unto the said trustees for establishing the colony of Georgia aforesaid, and their successors, all his one undivided eighth part of or belonging to the said John Lord Carteret (the whole into eight equal parts to be divided) of, in and to the aforesaid territory, seven undivided eighth parts of which had been before granted by his said majesty to said trustees.

And the jury further find, that one-eighth part of the said territory, granted to the said lords proprietors, and called Carolina as aforesaid, which eighth part belonged *to Sir George Carteret, and was not surrendered [^{*99} as aforesaid, was afterwards divided and set off in severalty to the heirs of the said Sir George Carteret, in that part of said territory which was afterwards made a colony by the name of North Carolina. That afterwards, in the same year, the said James Oglethorpe, Esq., one of the said corporation, for and in the name of, and as agent to, the said corporation, with a large number of other persons under his authority and control, took possession of said territory, granted as aforesaid to the said corporation, made a treaty with some of the native Indians within said territory, in which, for and in behalf of said corporation, he made purchases of said Indians of their native rights to parts of said territory, and erected forts in several places to keep up marks of possession. That afterwards, on the 6th day of September, in the year last mentioned, on the application of said corporation to the said board of trade, they, the said board of trade, in the name of his said majesty, sent instructions to said Robert Johnson, then governor of South Carolina, thereby willing and requiring him to give all due countenance and encouragement for the settlement of the said colony of Georgia, by being aiding and assisting to any settlers therein : and further requiring him to cause to be registered the aforesaid charter of the colony of Georgia, within the said province of South Carolina, and the same to be entered of record by the proper officer of the said province of South Carolina.

And the jury further find, that the governor of South Carolina, after the granting the said charter of the colony of Georgia, did exercise jurisdiction south of the southern limits of said colony of Georgia, claiming the same to

Fletcher v. Peck.

be within the limits of his government ; and particularly, that he had the superintendency and control of a military post there, and did make divers grants of land there, which lands have ever since been holden under his said grants. That afterwards, in the year of our Lord 1752, by deed of indenture, made between his said majesty, George the second, of the one part, and the said trustees for establishing the *colony in America, of the [100] other part, they the said trustees, for divers valuable considerations therein expressed, did, for themselves and their successors, grant, surrender and yield up to his said majesty, George the second, his heirs and successors, their said letters-patent and their charter of corporation, and all right, title and authority to be or continue a corporate body, and all their powers of government, and all other powers, jurisdictions, franchises, pre-eminentes and privileges, therein or thereby granted or conveyed to them ; and did also grant and convey to his said majesty, George the second, his heirs and successors, all the said lands, countries, territories and premises, as well the said one-eighth part thereof granted by the said John Lord Carteret to them as aforesaid, as also the said seven-eighth parts thereof, granted as aforesaid by his said majesty's letters-patent or charter as aforesaid, together with all the soils, grounds, havens, ports, bays, mines, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminentes, within said territories, with all their right, title, interest, claim or demand whatsoever in and to the premises ; and which grant and surrender aforesaid was then accepted by his said majesty, for himself and his successors ; and said indenture was duly executed on the part of said trustees, with the privity and by the direction of the common council of the said corporation, by affixing the common seal of said corporation thereunto, and on the part of his said majesty, by causing the great seal of Great Britain to be thereunto affixed. That afterwards, on the 6th day of August 1754, his said majesty, George the second, by his royal commission of that date, under the great seal of Great Britain, constituted and appointed John Reynolds, Esq., to be captain-general and commander-in-chief in and over said colony of Georgia, in America, with the following boundaries, viz : lying from the most north-easterly stream of a river there commonly called Savannah, all along the sea-coast to the southward unto the most southern stream of a certain other great water or river called the Alatamaha, and westward from the heads of the said rivers, respectively, in straight lines, to the South Seas, and all the [101] space, circuit and precinct of *land lying within the said boundaries, with the islands in the sea lying opposite to the eastern coast of said lands, within twenty leagues of the same. That afterwards, on the 10th day of February, in the year of our Lord 1763, a definitive treaty of peace was concluded at Paris, between his catholic majesty, the King of Spain, and his majesty, George the third, King of Great Britain ; by the 20th article of which treaty, his said catholic majesty did cede and guaranty in full right to his Britannic majesty, Florida, with fort St. Augustin, and the bay of Pensacola, as well as all that Spain possessed on the continent of North America, to the east or to the south-east of the river Mississippi, and in general, all that depended on the said countries and island, with the sovereignty, property, possession, and all rights acquired by treaties or otherwise, which the catholic king and the crown of Spain had till then over the said countries, lands, places and their inhabitants; so that

Fletcher v. Peck.

the catholic king did cede and make over the whole to the said king and the said crown of Great Britain, and that in the most ample manner and form.

That afterwards, on the 7th day of October, in the year of our Lord 1763, his said majesty, George the third, King of Great Britain, by and with the advice of his privy council, did issue his royal proclamation, therein publishing and declaring, that he, the said King of Great Britain, had, with the advice of his said privy council, granted his letters-patent, under the great seal of Great Britain, to erect within the countries and islands ceded and confirmed to him by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada; in which proclamation, the said government of West Florida is described as follows, viz: Bounded to the southward by the gulf of Mexico, including all islands within six leagues of the coast, from the river Apalachicola to lake Pontchartrain, to the westward, by the said lake, the lake Maurepas, and the river Mississippi; to the northward, by *a line drawn [*102 due east from that part of the river Mississippi which lies in thirty-one degrees of north latitude, to the river Apalachicola or Catahouchee; and to the eastward, by the said river. And in the same proclamation, the said government of East Florida is described as follows, viz: bounded to the westward, by the gulf of Mexico and the Apalachicola river; to the northward, by a line drawn from that part of the said river where the Catahouchee and Flint rivers meet, to the source of St. Mary's river, and by the course of the said river to the Atlantic Ocean; and to the east and south, by the Atlantic Ocean and the gulf of Florida, including all islands within six leagues of the sea coast. And in and by the same proclamation, all lands lying between the rivers Alatamaha and St. Mary's were declared to be annexed to the said province of Georgia; and that in and by the same proclamation, it was further declared by the said king as follows, viz: "That it is our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

And the jury find, that the land described in the plaintiff's declaration did lie to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid. That afterwards, on the 21st day of November, in the year of our Lord 1763, and in the 4th year of the reign of said King George the third, he the said king, by his royal commission, under the great seal of Great Britain, did constitute and appoint *George Johnstone, Esq., captain-general and governor in chief over [*103 the said province of West Florida, in America; in which commission, the said province was described in the same words of limitation and extent, as in said proclamation is before set down. That afterwards, on the 20th day of January, in the year of our Lord 1764, the said King of Great Britain, by his commission, under the great seal of Great Britain, did constitute and

Fletcher v. Peck.

appoint James Wright, Esq., to be the captain-general and governor in chief in and over the colony of Georgia, by the following bounds, viz: bounded on the north by the most northern stream of a river there commonly called Savannah, as far as the heads of the said river; and from thence westward, as far as our territories extend; on the east, by the sea-coast, from the said river Savannah to the most southern stream of a certain other river, called St. Mary (including all islands within twenty leagues of the coast lying between the said river Savannah and St. Mary, as far as the head thereof); and from thence westward, as far as our territories extend, by the north boundary line of our provinces of East and West Florida.

That afterwards, from the year 1775, to the year 1783, an open war existed between the colonies of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, called the United States, on the one part, and his said majesty, George the third, King of Great Britain, on the other part. And on the 3d day of September, in the year of our Lord 1783, a definitive treaty of peace was signed and concluded at Paris, by and between certain authorized commissioners on the part of the said belligerent powers, which was afterwards duly ratified and confirmed by the said two respective powers; by the first article of which treaty, the said King George the third, by the name of his Britannic majesty, acknowledged the aforesaid United *104] *States to be free, sovereign and independent states; that he treated with them as such, and for himself, his heirs and successors, relinquishes all claim to the government, propriety and territorial rights of the same, and every part thereof; and by the 2d article of said treaty, the western boundary of the United States is a line drawn along the middle of the river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; and the southern boundary is a line drawn due east from the determination of the said line, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Catahouchee; thence along the middle thereof, to its junction with the Flint river; thence straight to the head of St. Mary's river; and thence down along the middle of St. Mary's river to the Atlantic Ocean.

And the jury further find, that in the year of our Lord 1782, the congress of the United States did instruct the said commissioners, authorized on the part of the United States to negotiate and conclude the treaty aforesaid, that they should claim in this negotiation, respecting the boundaries of the United States, that the most northern part of the thirty-first degree of north latitude should be agreed to be the southern boundary of the United States, on the ground, that that was the southern boundary of the colony of Georgia; and that the river Mississippi should be agreed to be the western boundary of the United States, on the ground, that the colony of Georgia and other colonies, now states of the United States, were bounded westward by that river; and that the commissioners on the part of the United States did, in said negotiation, claim the same accordingly, and that on those grounds, the said southern and western boundaries of the United States were agreed to by the commissioners on the part of the King of Great Britain. That afterwards, in the same year, the legislature of the state of Georgia passed an act, declaring her right, and proclaiming her title to all the lands lying

Fletcher v. Peck.

within her boundaries to the river Mississippi. And in the year of our Lord, 1785, *the legislature of the said state of Georgia established a county, [*105 by the name of Bourbon, on the Mississippi, and appointed civil officers for said county, which lies within the boundaries now denominated the Mississippi territory ; that thereupon, a dispute arose between the state of South Carolina and the state of Georgia, concerning their respective boundaries, the said states separately claiming the same territory ; and the said state of South Carolina, on the first day of June, in the year of our Lord 1785, petitioned the congress of the United States for a hearing and determination of the differences and disputes subsisting between them and the state of Georgia, agreeable to the ninth article of the then confederation and perpetual union between the United States of America ; that the said congress of the United States did thereupon on the same day resolve, that the second Monday in May then next following should be assigned for the appearance of the said states of South Carolina and Georgia, by their lawful agents, and did then and there give notice thereof to the said state of Georgia, by serving the legislature of said state with an attested copy of said petition of the state of South Carolina, and said resolve of congress. That afterwards, on the 8th day of May, in the year of our Lord 1786, by the joint consent of the agents of said states of South Carolina and Georgia, the congress resolved that further day be given for the said hearing, and assigned the 15th day of the same month for that purpose. That afterwards, on the 18th day of May aforesaid, the said congress resolved, that further day be given for the said hearing, and appointed the first Monday in September, then next ensuing, for that purpose. That afterwards, on the first day of September then next ensuing, authorized agents from the states of Carolina and Georgia attended in pursuance of the order of congress aforesaid, and produced their credentials, which were read in congress, and there recorded, together with the acts of their respective legislatures ; which acts and credentials authorized the said agents to settle and compromise all the differences *and disputes aforesaid, as well as to appear and represent [*106 the said states, respectively, before any tribunal that might be created by congress for that purpose, agreeably to the said ninth article of the confederation. And in conformity to the powers aforesaid, the said commissioners of both the said states of South Carolina and Georgia, afterwards, on the 28th day of April, in the year of our Lord 1787, met at Beaufort, in the state of South Carolina, and then and there entered into, signed, and concluded a convention between the states of South Carolina and Georgia aforesaid. By the first article of which convention, it was mutually agreed between the said states, that the most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers then called Tugaloo and Keowee ; and from thence the most northern branch or stream of said river Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said rivers Savannah and Tugaloo, to Georgia ; but if the head, spring or source of any branch or stream of the said river Tugaloo does not extend to the north boundary line of South Carolina, then a west course to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugaloo river, which extends to the highest northern latitude, shall for ever thereafter form

Fletcher v. Peck.

the separation, limit, and boundary between the states of South Carolina and Georgia. And by the third article of the convention aforesaid, it was agreed by the said states of South Carolina and Georgia, that the said state of South Carolina should not thereafter claim any lands to the eastward, southward, south-eastward, or west of the said boundary above established ; and that the said state of South Carolina did relinquish and cede to the said state of Georgia all the right, title and claim which the said state of South Carolina had to the government, sovereignty and jurisdiction in and over the same, and also the right and pre-emption of soil from the native Indians, and all the estate, property and claim which the said state of South Carolina had in or to the said lands.

*107] *And the jury further find, that the land described in the plaintiff's declaration is situate south-west of the boundary line last aforesaid ; and that the same land lies within the limits of the territory granted to the said lords proprietors of Carolina, by King Charles the second, as aforesaid, and within the bounds of the territory agreed to belong and ceded to the King of Great Britain, by the said treaty of peace made in 1763, as aforesaid ; and within the bounds of the United States, as agreed and settled by the treaty of peace in 1783, as aforesaid ; and north of a line drawn due east from the mouth of the said river Yazoo, where it unites with the Mississippi aforesaid. That afterwards, on the 9th day of August, in the year of our Lord 1787, the delegates of said state of South Carolina in congress, moved, that the said convention, made as aforesaid, be ratified and confirmed, and that the lines and limits therein specified be thereafter taken and received as the boundaries between the said states of South Carolina and Georgia ; which motion was by the unanimous vote of congress committed, and the same convention was thereupon entered of record on the journals of congress ; and on the same day, John Kean and Daniel Huger, by virtue of authority given to them by the legislature of said state of South Carolina, did execute a deed of cession on the part of said state of South Carolina, by which they ceded and conveyed to the United States, in congress assembled, for the benefit of all the said states, all their right and title to that territory and tract of land included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary line of the state of North Carolina ; and continuing along the said boundary line, until it intersects the ridge or chain of mountains which divides the eastern from the western waters ; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river to the said mountains, and thence to run a due west course to the river Mississippi ; which deed of cession was *thereupon received *108] and entered on the journals of congress, and accepted by them.

The jury further find, that the congress of the United States did, on the 6th day of September, in the year of our Lord 1780, recommend to the several states in the Union, having claims to western territory, to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the Union. That afterwards, on the 9th day of August, in the year of our Lord 1786, the said congress resolved, that whereas, the states of Massachusetts, New York, Connecticut and Virginia had, in consequence of the recommendation of congress on the 6th day of

Fletcher v. Peck.

September aforesaid, made cessions of their claims to western territory to the United States in congress assembled, for the use of the United States, the said subject be again presented to the view of the states of North Carolina, South Carolina and Georgia, who had not complied with so reasonable a proposition ; and that they be once more solicited to consider with candor and liberality the expectations of their sister states, and the earnest and repeated applications made to them by congress on this subject. That afterwards, on the 20th day of October, 1787, the congress of the United States passed the following resolve, viz : that it be and hereby is represented to the states of North Carolina and Georgia, that the lands which have been ceded by the other states in compliance with the recommendation of this body, are now selling in large quantities for public securities ; that the deeds of cession from the different states have been made, without annexing an express condition, that they should not operate till the other states, under like circumstances, made similar cessions ; and that congress have such faith in the justice and magnanimity of the states of North Carolina and Georgia, that they only think it necessary to call their attention to these circumstances, not doubting but, upon consideration of the subject, they will feel those obligations which will induce similar cessions, and justify that confidence which has been *placed in them. That afterwards, on the first day of February [*109 1788, the legislature of said state of Georgia, then duly convened, passed an act for ceding part of the territorial claims of said state to the United States ; by which act the state of Georgia authorized her delegates in congress to convey to the United States the territorial claims of said state of Georgia to a certain tract of country bounded as follows, to wit : beginning at the middle of the river Catahouchee or Apalachicola, where it is intersected by the thirty-first degree of north latitude, and from thence, due north, 140 miles, thence, due west, to the river Mississippi ; thence down the middle of the said river to where it intersects the thirty-first degree of north latitude, and along the said degree, to the place of beginning : annexing the provisions and conditions following, to wit : That the United States in congress assembled, shall guaranty to the citizens of said territory a republican form of government, subject only to such changes as may take place in the federal constitution of the United States. Secondly, that the navigation of all the waters included in the said cession shall be equally free to all the citizens of the United States ; nor shall any tonnage on vessels, or any duties whatever, be laid on any goods, wares or merchandises that pass up or down the said waters, unless for the use and benefit of the United States. Thirdly, that the sum of \$171,428.45, which has been expended in quieting the minds of the Indians, and resisting their hostilities, shall be allowed as a charge against the United States, and be admitted in payment of the specie requisition of that state's quotas that have been or may be required by the United States. Fourthly, that in all cases where the state may require defence, the expenses arising thereon shall be allowed as a charge against the United States, agreeably to the articles of confederation. Fifthly, that congress shall guaranty and secure all the remaining territorial rights of the state, as pointed out and expressed by the definitive treaty of peace between the United States and Great Britain, the convention between the said [*110 *state and the state of South Carolina, entered into the 28th day of April, in the year of our Lord 1787, and the clause of an act of the said

Fletcher v. Peck.

state of Georgia, describing the boundaries thereof, passed the 17th day of February, in the year 1783, which act of the said state of Georgia, with said conditions annexed, was by the delegates of said state in congress presented to the said congress, and the same was, after being read, committed to a committee of congress ; who, on the 15th day of July, in the said year 1788, made report thereon to congress, as follows, to wit : "The committee, having fully considered the subject referred to them, are of opinion, that the cession offered by the state of Georgia cannot be accepted on the terms proposed : First, because it appears highly probable that on running the boundary line between that state and the adjoining state or states, a claim to a large tract of country extending to the Mississippi, and lying between the tract proposed to be ceded, and that lately ceded by South Carolina, will be retained by the said state of Georgia ; and therefore, the land which the state now offers to cede must be too far removed from the other lands hitherto ceded to the Union to be of any immediate advantages to it. Secondly, because there appears to be due from the state of Georgia, on specie requisitions, but a small part of the sum mentioned in the third proviso or condition before recited ; and it is improper in this case to allow a charge against the specie requisitions of congress which may hereafter be made, especially, as the said state stands charged to the United States for very considerable sums of money loaned. And thirdly, because the fifth proviso or condition before recited contains a special guaranty of territorial rights, and such a guaranty has not been made by congress to any state, and which, considering the spirit and meaning of the confederation, must be unnecessary and improper. But the committee are of opinion, that the first, second and fourth provisions, before recited, and also the third, with some variations, may be admitted ; and that, should the said state extend the bounds of her cession, *and vary the terms thereof as hereinafter mentioned, congress may accept the same. Whereupon, they submit the following resolutions : That the cession of claims to western territory, offered by the state of Georgia, cannot be accepted on the terms contained in her act passed the first of February last. That in case the said state shall authorize her delegates in congress to make a cession of all her territorial claims to lands west of the river Apalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude, and shall omit the last proviso in her said act, and shall so far vary the proviso respecting the sum of \$171,428.45, expended in quieting and resisting the Indians, as that the said state shall have credit in the specie requisitions of congress, to the amount of her specie quotas on the past requisitions, and for the residue, in her account with the United States for moneys loaned, congress will accept the cession." Which report being read, congress resolved, that congress agree to the said report.

The jury further find, that in the year of our Lord 1793, Thomas Jefferson, Esq., then secretary of state for the United States, made a report to the then President of the United States, which was intended to serve as a basis of instructions to the commissioners of the United States for settling the points which were then in dispute between the King of Spain and the government of the United States ; one of which points in dispute was, the just boundaries between West Florida and the southern line of the United

Fletcher v. Peck.

States. On this point, the said secretary of state, in his report aforesaid, expresses himself as follows, to wit : "As to boundary, that between Georgia and West Florida is the only one which needs any explanation. It (that is, the court of Spain) sets up a claim to possessions within the state of Georgia, founded on her (Spain) having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply. The several states now composing the United [*112 *States of America were, from their first establishment, separate and distinct societies, dependent on no other society of men whatever. They continued at the head of their respective governments, the executive magistrate who presided over the one they had left, and thereby secured in effect a constant amity with the nation. In this stage of their government, their several boundaries were fixed, and particularly the southern boundary of Georgia, the only one now in question, was established at the thirty-first degree of latitude, from the Apalachicola westwardly. The southern limits of Georgia depend chiefly on, first, the charter of South Carolina, &c.; secondly, on the proclamation of the British king, in 1763, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in thirty-one degrees of north latitude, and running eastwardly to the Apalachicola, &c. That afterwards, on the 7th day of December, of the same year, the commissioners of the United States for settling the aforesaid disputes, in their communications with those of the King of Spain, express themselves as follows, to wit : 'In this stage of their (meaning the United States) government, the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the proclamation of the King of Great Britain, their chief magistrate, in the year 1763, at a time when no other power pretended any claim whatever to any part of the country through which it ran. The boundary of Georgia was thus established : to begin in the Mississippi, in latitude thirty-one north, and running eastward to the Apalachicola,' &c. From what has been said, it results, first, that the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year 1763 : secondly, that it has been confirmed by the only power that could at any time have pretensions to contest it."

That afterwards, on the 10th day of August, in the year 1795, Thomas Pinckney, Esq., minister plenipotentiary* of the United States at the [*113 court of Spain, in a communication to the Prince of Peace, prime minister of Spain, agreeable to his instructions from the President of the United States on the subject of said boundaries, expresses himself as follows, to wit : "Thirty-two years have elapsed since all the country on the left or eastern bank of the Mississippi, being under the legitimate jurisdiction of the King of England, that sovereign thought proper to regulate with precision the limits of Georgia and the two Floridas, which was done by his solemn proclamation, published in the usual form ; by which he established between them precisely the same limits that, near twenty years after, he declared to be the southern limits of the United States, by the treaty which the same King of England concluded with them in the month of November, 1782."

That afterwards, on the 27th day of October, in the year 1795, a treaty of friendship, limits and navigation was concluded between the United

Fletcher v. Peck.

States and his catholic majesty the King of Spain ; in the second article of which treaty, it is agreed, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the river Apalachicola or Catahouchee, thence along the middle thereof, to its junction with the Flint, thence straight to the head of St. Mary's river, and thence down the middle thereof to the Atlantic ocean."

But whether, upon the whole matter, the state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the plaintiff, in his assignment of the breach in the fourth count of his declaration, was seised in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title *114] "to part thereof, the jury are ignorant, and pray the advisement of the court thereon ; and if the court are of opinion, that the said state of Georgia was so seised, at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was seised in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find, that the said Peck, his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not broken, but hath kept the same.

But if the court are of opinion, that the said state of Georgia was not so seised at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was not seised of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof ; and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not kept, but broken the same ; and assess damages for the plaintiff, for the breach thereof, in the sum of \$3000, and costs of suit.

Whereupon, it was considered and adjudged by the court below, that on the issues on the three first counts, the several pleas are good and sufficient, and that the demurrer thereto be overruled ; and on the last issue, on which there is a special verdict, that the state of Georgia was seised, as alleged by the defendant, and that the defendant recover his costs.

The plaintiff sued out his writ of error, and the case was twice argued, first, by *Martin*, for the plaintiff in error, and by *J. Q. Adams*, and *R. G. Harper*, for the *defendant, at February term 1809, and again at this *115] term, by *Martin*, for the plaintiff, and by *Harper* and *Story*, for the defendant.

Martin, for the plaintiff in error.—The first plea is no answer to the first count. The breach of the covenant complained of is, that "the legislature

Fletcher v. Peck.

had no authority to sell and dispose of" the land, but the plea is, that "the said Matthews, governor of the said state, was fully and legally empowered to sell and convey" the land. Although the governor had authority to sell *non constat* that the legislature had.

The same objection applies to the second plea; it is an answer to the inducement, not to the point of the plea. The breach assigned in the second count is, "that the title which the state of Georgia at any time had in the premises was never legally conveyed to the said Peck, by force of the conveyances aforesaid." The improper influence upon the members of the legislature was only inducement. The plea is, the defendant had no notice nor knowledge of the improper means used. It is no answer to the breach assigned. The same objection applies also to the third plea.

It appears upon the special verdict, that the state of Georgia never was seised in fee of the lands. They belonged to the crown of Great Britain, and at the revolution devolved upon the United States, and not upon the state of Georgia. When the colonies of North Carolina and South Carolina were royal colonies, the king limited the boundaries, and disannexed these lands from Georgia.

Argument for the *defendant* in error.—The first fault of pleading is in the declaration. *The breach of the covenant is not well assigned in [*116 the first count. The covenant is, that the legislature had good right to sell. The breach assigned is, that the legislature had no authority to sell. Authority and right, are words of a different signification. Right implies an interest: authority is a mere naked power. But if the breach be well assigned, the plea is a substantial answer to it, for if the governor derived full power and authority from the legislature to sell, the legislature must have had that power to give. The plea shows the title to be in the state of Georgia. The objection is only to the form of the plea, which cannot prevail upon a general demurrer.

Two questions arise upon the issue joined upon the 4th plea. 1st Whether the title was in the state of Georgia; and 2d. Whether it was in the United States.

At the beginning of the revolution, the lands were within the bounds of Georgia. These bounds were confirmed by the treaty of peace in 1783, and recognised in the treaty with Spain in 1795, and by the cession to the United States in 1802. The United States can have no title but what is derived from Georgia.

The title of Georgia depends upon the facts found in the special verdict. The second charter granted by George II., in 1732, includes these lands, the bounds of that grant being from the Savannah to the Alatamaha, and from the heads of those rivers, respectively, in direct lines, to the South Sea. It is not admitted, that the king had a right to enlarge or diminish the boundaries, even of royal provinces. *The exercise of that right, [*117 even by parliament itself, was one of the violations of right upon which the revolution was founded; as appears by the declaration of independence, the address to the people of Quebec, and other public documents of the time. This right, claimed by the king, was denied by Virginia and North Carolina, in their constitutions. See the article of the constitution of Virginia respecting the limits of that state; and the 25th section of the

Fletcher v. Peck.

declaration of rights of North Carolina ; 1 Belsham's Hist. of Geo. III.; The Quebec Act ; and the Collection of State Constitutions, p. 180. The right was denied by the commissioners on the part of the United States, who formed the treaty, and was given up by Great Britain, when the present line was established.

But the proclamation of 1763 did not profess or intend to disannex the western lands from the province of Georgia. The king only declares that it is his royal will and pleasure for the present, "as aforesaid," to reserve under his sovereignty, protection and dominion, for the use of the Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west ; and he thereby forbids his subjects from making purchases or settlements, or taking possession of the same. This clause of the proclamation cannot well be understood without the preceding section to which it refers, by the words "as aforesaid."

The preceding clause is, "that no governor or commander in chief of our other colonies or plantations in America, *i. e.* (other than the colonies of Quebec, East Florida and West Florida), do presume, for the present, and until our further pleasure be known, to grant warrants of surveys, or pass patents for any lands beyond the heads or sources of any of the rivers, which fall into the Atlantic ocean from the west or north-west ; or upon any lands *whatever which, not having been ceded to, or purchased by us, as
*118] aforesaid, are reserved to the said Indians, or any of them."

Then comes the clause in question, which is supposed to have disannexed these lands from Georgia, as follows : " And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid," &c. It was a prohibition to all the governors of all the colonies, and a reservation of all the western lands attached to all the colonies. But it was only a temporary reservation for the use of the Indians.

If this proclamation disannexed these lands from Georgia, it also disannexed all the western lands from all the other colonies. But if they were disannexed by the proclamation, they were reannexed, three months afterwards, by the commission to Governor Wright, on the 20th of January 1764. It appears by the report of the attorney-general, as well as by Mr. Chalmers's observations, that it never was the opinion of the British government, that these lands were disannexed by the proclamation.

If they were not reannexed before, they certainly were by the treaty of peace. At the commencement of the revolution, the lands then belonged to and formed a part of the province of Georgia. By the declaration of independence, the several states were declared to be free, sovereign and independent states; and the sovereignty of each, not of the whole, was the principle of the revolution; there was no connection between them, but that of necessity and self-defence, and in what manner each should contribute to the
*common cause, was a matter left to the discretion of each of the states.
*119]

By the second article of the confederation, the sovereignty of each state is confirmed, and all the rights of sovereignty are declared to be retained,

Fletcher v. Peck.

which are not by that instrument expressly delegated to the United States in congress assembled. It provides also, that no state shall be deprived of territory for the benefit of the United States.

On the 25th of February 1783, the legislature of Georgia passed an act declaring her boundaries, before the definitive treaty of peace. This declaration of Georgia was not contradicted by the United States in any public act. In 1785, Georgia passed an act erecting the county of Bourbon in that territory; this produced a dispute with South Carolina, which ended in the acknowledgment of the right of Georgia to these lands. (See the third article of the convention between South Carolina and Georgia.) The same boundaries are acknowledged by the United States in their instructions, given by the secretary of state, Mr. Jefferson, in 1793, to the commissioners appointed to settle the dispute with Spain respecting boundaries.

The United States certainly had no claim at the commencement of the revolution, nor at the declaration of independence, nor under the articles of confederation. During the progress of the revolution, a demand was made by two or three of the states, that crown lands should be appropriated for the common defence. But congress never asserted such a right. They only recommended that cessions of territory should be made by the states for that purpose. The journals of congress are crowded with proofs of this fact. See journals of congress, 16th September 1776, vol. 2, p. 336 ; 30th of October 1776 ; 15th *October 1777, vol. 3, p. 345 ; 27th October 1777, [*120 vol. 3, p. 363 ; 22d June 1778, vol. 4, p. 262 ; 23d and 25th June 1778, p. 269 ; 1779, vol. 5, p. 49 ; 21st May 1779, vol. 5, p. 158 ; 1st March 1781 ; Resolution of 1780, vol. 6, p. 123 ; 12th February 1781, vol. 7, p. 26 ; 1st March 1781 ; 29th October 1782, vol. 8, p. —.

At the treaty of peace, there was no idea of a cession of land to the United States, by Great Britain. The bounds of the United States were fixed as the bounds of the several states had been before fixed. The United States did not claim land for the United States as a nation; they claimed only in right of the individual states. Great Britain yielded the principle of the royal right to disannex lands from the colonies, and acquiesced in the principle contended for by the United States, which was the old boundary of the several states. See Chief Justice JAY's opinion in the case of *Chisholm v. The State of Georgia*, reported in a pamphlet published in 1793.

The United States, then, had no title by the treaty of peace. She has since (viz., in 1788) declined accepting a cession of the territory from Georgia, not because the United States had already a title, but because the lands were too remote, &c.

There is nothing in the constitution of the United States, which can give her a title. By the third section of the fourth article, the claims of particular states are saved.

The public acts since the adoption of the new constitution are the instructions to the commissioners in 1793, to settle the boundaries with Spain. The treaty with Spain, 27th October 1795 ; the act of congress of 7th April 1798 (1 U. S. Stat. 549) ; the act of 10th of May 1800, the remonstrance of Georgia, in December 1800 ; and the cession by Georgia to the United States in 1802. All these public acts recognised the title to be in Georgia.

Fletcher v. Peck.

*If then Georgia had good title on the 7th of January 1795, the next question is, had the legislature of that state a right to sell? By the revolution, all the right and royal prerogatives devolved upon the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of disposing of the lands belonging to the state naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. The sale itself was not a legislative act. It was not an act of sovereignty, but a mere conveyance of title. 2 Tucker's Bl. Com. 53, 57; Montesquieu, lib. 26, c. 15; 2 Dall. 320; *Cooper v. Telfair*, 4 Ibid. 14; Constitution of Georgia, art. 1, § 16; Digest of Georgia Laws of 7th June 1777, 1780, 1784, 1785, 1788, 1789 and 1790. These show the universal practice of Georgia in this respect.

A doubt has been suggested, whether this power extends to lands to which the Indian title has not been extinguished. What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. Vattel, lib. 1, § 81, p. 37, and § 209; lib. 2, § 97; Montesquieu, lib. 18, c. 12; Smith's Wealth of Nations, b. 5, c. 1. It is a right not to be transferred, but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

Although the power to extinguish this right by treaty, is vested in congress, yet Georgia had a right to sell, subject to the Indian claim. The point has never been decided in the courts of the United States, because it has never before been questioned. The right has been exercised and recognised by all the states.

*¹²²There was no objection to the sale, arising from the constitution of Georgia. With regard to state constitutions, it is not necessary that the powers should be expressly granted, however it may be with the constitution of the United States. But it is not constitutional doctrine, even as it applies to the legislature of the United States. The old articles of confederation limited the powers of congress to those expressly granted. But in the constitution of the United States, the word expressly, was purposely rejected. See the Federalist; and Journals of House of Rep. 21st August 1789; Journal of Senate, 7th September 1789.

But if the legislature of Georgia could only exercise powers expressly given, they had no power to abrogate the contract.

A question has been suggested from the bench, whether the right which Georgia had, before the extinguishment of the Indian title, is such a right as is susceptible of conveyance, and whether it can be said to be a title in fee-simple? The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil, but a right of occupation. A right not individual, but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives. Even Penn claimed under the right of conquest. He took under a charter from the King of England, whose right was the right of conquest. Hence, the feudal tenures in this country. All

Fletcher v. Peck.

the treaties with the Indians were the effect of conquest ; all the extensive grants have been forced from them by successful war. The conquerors permitted the conquered tribes to occupy part of the land, until it should be wanted for the use of the conquerors. Hence, the acts of legislation *fixing the lines and bounds of the Indian claims ; hence the pro- [*123
hibition of individual purchasers, &c.

The rights of governments are allodial. The crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When that claim was extinguished, the grantee was always admitted to have acquired a complete title. The Indian title is a mere privilege, which does not affect the allodial right.

The legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void ; that is the exercise of a judicial, not a legislative function. It is the province of the judiciary, to say what the law is, or what it was. The legislature can only say, what it shall be.

The legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contracts. A grant is a contract executed, and it creates also an implied executory contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant.

The validity of a law cannot be questioned, because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal to disregard the law. This would open a source of litigation which could never be closed. The law would be differently decided by different juries ; innumerable perjuries would be committed, and inconceivable confusion would ensue. But the parties now before the court are innocent of the fraud, if any has been practised. They were *bond fide* purchasers, for a valuable consideration, without notice of fraud. They cannot be affected by it.

*Martin, in reply.—All the western lands of the royal govern- [*124
ments were wholly disannexed from the colonies, and reserved for the use of the Indians. Georgia never had title in those lands. It is true, that Great Britain did undertake to extend the bounds of the royal provinces. The right was not denied, but the purpose for which it was executed. By the proclamation, if offenders should escape into those territories, they are to be arrested by the military force and sent into the colony for trial. In Governor Wright's commission, the western boundary of the colony is not defined. The jury has not found whether the lands were within Governor Wright's commission.

As to the Indian title. The royal provinces were not bodies politic for the purpose of holding lands : the title of the lands was in the crown. There is no law authorizing the several states to transfer their right subject to the Indian title : it was only a right of pre-emption which the crown had ; this right was not by the treaty ceded to Georgia, but to the United States. The land, when purchased of the Indians, is to be purchased for the benefit of the United States. There was only a possibility that the United States would purchase for the benefit of Georgia : but a mere possibility cannot be

Fletcher v. Peck.

sold or granted. The declarations and claims of Georgia could not affect the rights of the United States.

An attempt was made in congress to establish the principle that the land belonged to the United States; but the advocates of that doctrine were overruled by a majority. This, however, did not decide the question of right. *The states which advocated that principle did not think proper to refuse to join the confederacy, because it was not inserted among the articles of confederation, but they protested against their assent to the Union being taken as evidence of their abandonment of the principle.

*125] Nor is the assent of congress to the commission for settling the bounds between South Carolina and Georgia, evidence of an acknowledgment, on the part of the United States, that either of those states was entitled to those lands.

March 11th, 1809. MARSHALL, Ch. J., delivered the opinion of the court, upon the pleadings, as follows:—In this cause, there are demurrs to three pleas filed in the circuit court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant. To support this judgment, this court must concur in overruling all the demurrs; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words; “that the legislature of the said state (Georgia), at the time of the passing of the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act.” The breach of this covenant is assigned in these words: “now the said Fletcher saith that, at the time when the said act of the legislature of Georgia, entitled an act, &c., was passed, the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act.” *The plea sets forth the constitution of the state of Georgia, and avers that the lands lay within that state. It then sets forth the act of the legislature, and avers that the lands, described in the declaration, are included within those to be sold by the said act; and that the governor was legally empowered to sell and convey the premises. To this plea, the plaintiff demurred, and the defendant joined in the demurrer.

If it be admitted, that sufficient matter is shown, in this plea, to have justified the defendant in denying the breach alleged in the count, it must also be admitted, that he has not denied it. The breach alleged is, that the legislature had not authority to sell. The bar set up is, that the governor had authority to convey. Certainly, an allegation, that the principal has no right to give a power, is not denied, by alleging that he has given a proper power to the agent.

It is argued, that the plea shows, although it does not, in terms, aver, that the legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative. Had the plaintiff tendered an issue in fact upon this plea, that the governor was legally empowered to sell and convey the premises, it would have been a departure

Fletcher v. Peck.

from his declaration ; for the count to which this plea is intended as a bar alleges no want of authority in the governor. He was, therefore, under the necessity of demurring.

But it is contended, that although the plea be substantially bad, the judgment, overruling the demurrer, is correct, because the declaration is defective. The defect alleged in the declaration is, that the *breach is not assigned in the words of the covenant. The covenant is, that the legislature had a right to convey, and the breach is, that the legislature had no authority to convey. It is not necessary that a breach should be assigned in the very words of the covenant. It is enough, that the words of the assignment show, unequivocally, a substantial breach.¹ The assignment under consideration does show such a breach. If the legislature had no authority to convey, it had no right to convey.

It is, therefore, the opinion of this court, that the circuit court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought, therefore, to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration. The cause having been again argued at this term—

March 16th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows :—The pleadings being now amended, this cause comes on again to be heard on sundry demurrs, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach *in the second covenant contained in the deed. The covenant is, “that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act.” The breach assigned is, that the legislature had no power to sell. The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act. To this plea, the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which

¹ Wilcox v. Cohn, 5 Bl. C. C. 346; Potter v. Bacon, 2 Wend. 583; Harmony v. Bingham, 1 Duer 209.

Fletcher v. Peck.

were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. In this case, the court can perceive no such opposition. In the constitution of Georgia, adopted in the *129] *year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution. In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor. The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and under such influence, did vote for the passing of the said bill; by reason whereof, the said law was a nullity, &c., and so the title of the state of Georgia did not pass to the said Peck, &c. The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia. To this plea, the plaintiff demurred generally, and the defendant joined in the demurrer.

*That corruption should find its way into the governments of our *130] infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of

Fletcher v. Peck.

the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of the members? Would the act be null, whatever might be the wish of the nation? or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned. Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to the court, by *this count, that the state of [*131] Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that, therefore, the act is a mere nullity. This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law. The circuit court, therefore, did right in overruling this demurrer.

The 4th covenant in the deed is, that the title to the premises has been, in no way, constitutionally or legally impaired, by virtue of any subsequent act of any subsequent legislature of the state of Georgia. The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title [*132] of the state to the lands it contained. The count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void. After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original

Fleteder v. Peck.

grantees, and all intermediate holders of the property, were purchasers without notice. To this plea, there is a demurrer and joinder.

The importance and the difficulty of the questions, presented by these pleadings, are deeply felt by the court. The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly, to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also. The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory. It is, however, to be recollect^{*}, that the people can *act only by these agents, and that, [133] while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded. If the legislature be its own judge in its own case, it would seem equitable, that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will

¹ New Jersey v. Wilson, 7 Cr. 164; Williams v. Norris, 12 Wheat. 126; Planters' Bank v. Sharp, 6 How. 331; State Bank v. Knoop, 18 Id. 369; Van Hoffman v. Quincy, 4 Wall. 549.

Fleteher v. Peck.

not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse *between man and man would be very [*134 seriously obstructed, if this principle be overturned. A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case, the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation, so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrible; and those who purchased parts of it were not stained by that *guilt which infected the original transaction. [*135 Their case is not distinguishable from the ordinary case of purchasers of a legal estate, without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is

Fletcher v. Peck.

rendered so by a power applicable to the case of every individual in the community.¹

It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power ; and if any be prescribed, where are they to be found, if the property of an individual, *136] fairly and honestly acquired, may be seized without compensation ? *To the legislature, all legislative power is granted ; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection. It is the peculiar province of the legislature, to prescribe general rules for the government of society ; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire ; she is a member of the American union ; and that union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution ? In considering this very interesting question, we immediately ask ourselves, what is a contract ? Is a grant a contract ? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing ; such was the law under which the conveyance was made by the governor. A contract executed is one in which the *137] object *of contract is performed ; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution, as a law discharging the vendors of property from the obligation of executing their

¹ Terrett v. Taylor, 9 Cr. 43 ; Town of Paulet v. Clark, Id. 292 ; Hart v. Lamphire, 8 Pet. 280 ; McGee v. Mathis, 4 Wall. 143.

Fletcher v. Peck.

contracts by conveyances. It would be strange, if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised, that the framers of the constitution viewed, with some apprehension, *the violent acts which might grow out of the feelings [*138 of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form, the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. *This cannot be [*139 effected in the form of an *ex post facto* law, or bill of attainder; why then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States

Fletcher v. Peck.

jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say, that the state had passed a law absolving itself from the contract? It is scarcely to be conceived, that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seised in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. *The 4th count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia. To this count, the defendant pleads, that the state of Georgia was seised; and tenders an issue on the fact in which the plaintiff joins. On this issue, a special verdict is found.

The jury find the grant of Carolina by Charles II. to the Earl of Clarendon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea. They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina. That seven of the eight proprietors of the Carolinas surrendered to George II. the year 1729, who appointed a governor of South Carolina. That in 1732, George II. granted to the Lord Viscount Percival and others, seven-eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia. That the governor of South Carolina continued to exercise jurisdiction south of Georgia. That in 1752, the grantees surrendered to the crown. That in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony. That a treaty of peace was concluded between Great Britain and Spain, in 1763, in which the latter ceded to the former Florida, with [*141] Fort St. Augustin and the bay of Pensacola.

That in October 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha and St. Mary's should be annexed to Georgia.

Fletcher v. Peck.

The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters. That in November 1763, a commission was issued to the governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent states. That in April 1787, a convention was entered into between the states of South Carolina and Georgia, settling the boundary line between them. The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend, that the reservation for the use of the Indians, contained in the proclamation *of 1763, excepts the lands on the western waters [*142 from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state. The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement, suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted, whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of opinion, that the nature of the Indian title, which is certainly to be respected *by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state. [*143

Judgment affirmed, with costs.

Fletcher v. Peck.

JOHNSON, J.—In this case, I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare, that a state does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things ; a principle which will impose laws even on the Deity. A contrary opinion can only be maintained upon the ground, that no existing legislature can abridge the powers of those which will succeed it. To a certain extent, this is certainly correct ; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it, is to commit a species of political suicide. In fact, a power to produce its own annihilation, is an absurdity in terms. It is a power as utterly incomunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in no wise necessary to its political existence ; they are entirely accidental, and may be parted with, in every respect, similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it ; have nothing to act upon ; it has passed from them ; is vested in the individual ; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his, is his country's.

*As to the idea, that the grants of a legislature may be void, [144] because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure, for the same reason that all sovereign acts must be considered just ; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt. The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas, that I may have it distinctly understood, that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted, that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and effect of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the

Fletcher v. Peck.

word "contract," given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word "obligation," *which certainly imports an [*145] existing moral or physical necessity. Now, a grant or conveyance by no means necessarily implies the continuance of an obligation, beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio*, the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases, affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count, we are *called upon substantially to decide, "that the state of [*146] Georgia, at the time of passing the act of cession, was legally seised in fee of the soil (then ceded), subject only to the extinguishment of part of the Indian title." That is, that the state of Georgia was seised of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem, that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favor of it, but to me it appears, that the facts in the case are sufficient to support the opinion that the state of Georgia had not a fee-simple in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles. The question is, whether it can be correctly predicated of the interest or estate which the state of Georgia had in these lands, "that the state was seised thereof, in fee-simple." To me it appears, that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use.

Fletcher v. Peck.

The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states ; others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside ; others retain a limited sovereignty, and the absolute proprietorship of their soil : the latter in the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties [147] formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation ? It is awkward, to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple interest may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries ? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest, or of purchase, exclusively of all competitors, within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets ; and the limitation upon their sovereignty amounts to the right of governing every person within their limits, except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell ? And if this ever was anything more than a mere possibility, it certainly was reduced to that state, when the state of Georgia ceded to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, *however, in the respectable [148] gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

MASSIE v. WATTS.

Equity practice.—Local suit.—Land law of Kentucky.—Constructive trust.

The practice in Kentucky to call a jury to ascertain the facts in chancery causes, is incorrect. A suit in chancery by one who has the prior equity against him who has the eldest patent, is in its nature local, and if it be a mere question of title, must be tried in the district where the land lies.¹

But if it be a case of contract, or trust, or fraud, it is to be tried in the district where the defendant may be found.²

If, by any reasonable construction of an entry, it can be supported, the court will support it.³

When a given quantity of land is to be laid off on a given base, it must be included within four lines forming a square, as nearly as may be, unless the form be repugnant to the entry.

If the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location, by the application of certain principles, they will complete it.

If a location have certain material calls, sufficient to support it, and to describe the land, other calls, less material, and less incompatible with the essential calls of the entry, may be discarded.

The rectangular figure is to be preserved, if possible.

If an agent locate land for himself which he ought to have located for his principal, he is, in equity, a trustee for his principal.⁴

THIS was an appeal from the decree of the Circuit Court of the United States, for the district of Kentucky, in a suit in equity, brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1000 acres of land, in the state of Ohio, the defendant having obtained the legal title, with notice of the plaintiff's equitable title.

The bill stated that the defendant Massie (the appellant) had contracted with a certain Ferdinand O'Neal, to locate and survey for him a military warrant for 4000 acres, in his name (which the plaintiff afterwards purchased for a valuable consideration), and to receive for his services in locating and surveying the same, the sum of 50*l.*, which the plaintiff paid him. That the defendant located the said warrant, with the proper surveyor, and being himself a surveyor, he fraudulently made a survey purporting to be a survey of part of the entry, but variant from the same, and contrary to law, whereby the survey was entirely removed from the land entered with the surveyor, for the fraudulent purpose of giving way to a claim of the defendant's which he surveyed on the land entered for the plaintiff, whereby the plaintiff lost the land, and the defendant obtained the legal title. That the land adjoined the town of Chillicothe, and was worth \$15 an acre. The bill prayed that the defendant might be compelled to convey the *land [*149 to the plaintiff, or if that was not in his power, that he make compensation in damages.

The defendant, by his answer, denied that he contracted with the plaintiff to locate and survey the warrant in the name of O'Neal, but admitted that, in 1787, he was requested by W. Ellzey, to locate the warrant for O'Neal; that Ellzey informed him he was not authorized to make any

¹ Northern Indiana Railroad Co. v. Michigan Central Railroad Co., 15 How. 233. But see Munson v. Tryon, 6 Phila. 395, decided by STRONG, J.

² Pennoyer v. Neff, 95 U. S. 728; Bailey v.

Ryder, 10 N. Y. 363; Newton v. Bronson, 13 Id. 587; Gardner v. Ogden, 22 Id. 327.

³ And see Kerr v. Watts, 6 Wheat. 550, where this case is re-affirmed.

⁴ Irvine v. Marshall, 20 How. 558.

Massie v. Watts.

special contract with the defendant for his services, but he had no doubt, if he did the business, he would receive the customary compensation, which was 12*l.* 10*s.* per 1000 acres, or one-third of the land. He admitted that he made the entry, and that the plaintiff has paid him the 50*l.* But he denied that he made the survey improperly, or with a fraudulent intention. He said, that in the year 1793, as a deputy-surveyor, he surveyed the land on the Scioto, on which the claim of O'Neal depended ; but not wishing to take upon himself the construction of O'Neal's entry, he merely meandered the river, and referred the question to the principal surveyor, by whose directions he made the survey for O'Neal, in 1796, and without any instructions from O'Neal, or any agent for him. That when the entry was made, the country had been but recently explored, and none of the locators knew by survey the meanders of the Scioto. He did not admit that the entry had been surveyed contrary to location, but he surveyed it as he would have surveyed it for himself. He admitted, he made an entry for himself, and intended to appropriate the vacant land, but it was not by any procurement of his, that his patent was prior to O'Neal's. That the plaintiff did not become wholly interested in the claim, until long after the survey was made.

After the defendant's answer came in, the plaintiff amended his bill by making Anderson (the principal surveyor) a defendant, and charged that if the survey for O'Neal was made by the directions of Anderson, as alleged by the defendant Massie, it was with a fraudulent design on the part of *150] Anderson to appropriate *to himself the land described in O'Neal's entry, and that if he had no design, he was still responsible for the consequences of the illegal survey.

Anderson, by his answer, denied all fraud, and most positively denied that he gave Massie any instructions to make the survey, as falsely stated in the bill. That the survey was made of 530 acres, in part of the entry, which survey was returned to his (Anderson's) office, and which he did not record for about the term of one year from the time he received it, doubting whether the survey had been properly made ; but after a critical examination of the subject, he concluded, that it was not improperly made, and recorded it.

The plaintiff amended his bill again, by charging that the defendant Massie was the owner of Powell's entry, and had surveyed and obtained a grant therefor, and calling upon him to answer, when he became the purchaser of Powell's right.

To this Massie answered, that after surveying O'Neal's entry, in the spring 1797, he purchased Robert Powell's survey, before which time, he had no interest in the land, and had sold the whole of it, but made a conveyance of only a part.

There had been certain facts found in the cause, by a jury, according to a practice, heretofore adopted in chancery suits, in the courts of Kentucky, but the court ordered "that the facts found by the jury should be set aside."

The following opinion of Judge INNIS (Judge TODD being absent) states the facts of the case so fully, that nothing need be added in stating the case.

Massie v. Watts.

"The complainant having acquired the equitable right to certain lands conferred on Ferdinand O'Neal, by the state of Virginia, as a bounty for military services performed by him as an officer, during the revolutionary war, has instituted this suit with a double aspect, first, to recover 1000 acres of land, *which had been entered for O'Neal on the Scioto river, upon [*151 a suggestion that the defendant Massie, who was the locator, had wrongfully deprived him of the land, by surveying Robert Powell's entry so as to cover part of O'Neal's land, and by a subsequent entry and survey of his own, hath taken the balance. Secondly, if the complainant shall establish his right to the land in contest, and cannot obtain a conveyance therefor, that the decree may be for the value thereof, in money. It appears from the pleadings in the cause, that the defendant Massie has purchased Powell's land, and that he has appropriated, by entry and survey, the adjoining land. The three following entries were made upon the Scioto river adjoining each other :

"No. 480. 1787, August 13, Major Thomas Massie enters 1400 acres of land, beginning at the junction of Paint creek with the Scioto, running up the Scioto 520 poles, when reduced to a straight line, thence off at right angles from the general course of the river, so far that a parallel thereto will include the quantity."

"No. 503. Captain Robert Powell enters 1000 acres of land, beginning at the upper corner, on the Scioto, of Major Thomas Massie's entry, No. 480, running up the river 520 poles, when reduced to a straight line, thence, from the beginning, with Massie's line, so far that a line parallel to the general course of the river shall include the quantity."

"No. 509. Captain Ferdinand O'Neal enters 1000 acres, beginning at the upper corner, on the Scioto, of Robert Powell's entry, No. 503, running up the river 520 poles, when reduced to a straight line, and from the beginning with Powell's line, so far that a line parallel with the general course of the river shall include the quantity."

"Surveys have been made upon the entries of Thomas Massie and Robert Powell, so as to cover almost the whole base of 1560 poles, the space which was allotted for the three claims on the river, and 530 acres of land have been surveyed for O'Neal, by the defendant Massie, in part of his entry, which it is impossible, upon any construction, he can hold.

*"To form a correct opinion in this case, the several entries of [*152 Massie, Powell and O'Neal must be brought into one view, and, so far as it is possible, consistent with the entries, to ascertain the object and intention of the locator. It is evident, from the manner in which these entries are worded, that the locator had no doubt in his mind, at the time the entries were made, of having given that space which would enable him to secure, by legal surveys, the quantity of land located for each person. It becomes, then, the duty of the court to consider the case with a reference to this object. No difficulty arises as to the manner in which the entry of Thomas Massie ought to be surveyed, the calls of his entry being express and positive. His entry ought to have been surveyed in the following manner; to begin, as he has done, at the junction of Paint creek and the Scioto, and then to run up the river so far as will ascertain the termination of the 520 poles called for, on the river, when reduced to a straight line. This will reduce his base to a point below the first flooded land, represented in the

Massie v. Watta.

connected plat, above the mouth of Paint creek, thence he is to run out at right angles with the general course of the river. The unexpected bends in the Scioto river have induced such a construction to be placed on the entries of Powell and O'Neal, by the defendant Massie, that, in executing the surveys of Thomas Massie and Powell, he considered O'Neal as being excluded from obtaining any part of the land upon the base of 1560 poles, the space allotted for three entries.

"The contest in this case, in consequence of the manner which has been pursued in making Massie's and Powell's surveys, rests principally upon the construction which is to be given to Powell's and O'Neal's entries; and as the latter is dependent on the former, equity requires that, if it be possible to secure to each his portion of land, agreeable to their entries, it ought to be so decided, provided it can be done consistently with the spirit of the entries, and the real intention of the locator.

"From an attentive consideration of the entries, the *object of the [153] locator was evidently to give to each of the proprietors of the warrants an equal base on the river, and make it the ruling principle in shaping the surveys. It only remains, then, to be considered, whether the words in the entries will bear such a construction as to effectuate the object, and secure the lands to Powell and O'Neal, which the locator intended at the time he made the entries.

Powell's first call is to run up the river Scioto; and the description given of the land contemplated to be covered by the survey, is that portion which shall lie within a line parallel to the general course of the river. From a view of the Scioto river, as laid down in the connected plat, and the shape which Thomas Massie's land will assume, when run out agreeable to his entry, it becomes necessary, in order to give Powell the land parallel to the general course of the river, to lay it off, by commencing the survey on the river, at the extremity of the 520 poles above Massie, and thence to run out at right angles to the general course of the river, so far that a parallel line to the river, extending to Massie's back line, and binding on Massie's lines, will include his 1000 acres. Reverse this mode of surveying Powell's entry, and begin at Massie's upper corner on the river and run out with Massie's line, it will make Massie's line the governing principle of the survey, and not the river, which construction will be contrary to the true meaning expressed in the entry, the intention of the locator, and place the survey on the land of O'Neal, whose interest, as a subsequent locator, is equally entitled to protection with that of the prior.

"The rule adopted in construing this entry must justify the manner of executing a survey agreeable thereto, by running five lines instead of four to circumscribe the land. This proceeds from an accidental circumstance occasioned by the great bend immediately above the mouth of Paint creek, which renders it necessary to comply with the governing principle in the entry for the land to be 'parallel to the general course of the river.' By thus executing Powell's survey, a portion of land will remain on the river, [154] and parallel thereto, *sufficient to satisfy O'Neal, the calls of whose entry are similar to Powell's, calling for him as he does for Massie. O'Neal's survey ought, therefore, to have been executed in the same manner as it is now decided. Powell's ought to have been made by beginning at

Massie v. Watts.

the termination of 520 poles on the river, and thence to run off at right angles from that point.

"Having decided the manner in which the entries of Massie, Powell and O'Neal ought to have been surveyed, it remains yet to say, what is the situation of the survey for 530 acres of land made for O'Neal, and placed on the record-book of the surveyor. To make this obligatory on the party, it was necessary that all the acts done should have been performed or approved by O'Neal himself, or some one of his assignees, or by some agent authorized for that purpose. There is no evidence in the cause to this effect: the placing the survey on the surveyor's book is, therefore, an unauthorized and void act.

"In the case of *Wilson v. Mason*, in the late district court, the court decided, that a survey once recorded was not afterwards in the power or control of the party. This opinion was predicated on two facts found in that cause, that William Mason was the agent of the defendant, and approved of what had been done, by registering the surveys of Mason, although cautioned of his danger.

"Upon this view of the case, the court is of opinion, that the complainant recover of the defendant 1000 acres of land, to be laid off agreeable to the mode pointed out as the proper manner for surveying O'Neal's entry. That upon the defendant Massie's conveying the said 1000 acres of land to the complainant, he, the complainant, shall assign to the said defendant all his right in and to 1000 acres of the warrant issued to the said O'Neal. *So far as this suit relates to the defendant Anderson, it is decreed and [*155 ordered, that the bill be dismissed as to him, with costs, the court being of opinion, he was improperly made a party. It is, therefore, considered by the court, that the defendant Anderson recover of the complainant his costs by him in this behalf expended."

And afterwards, at the same term, the following order was made herein. "The court in pursuance of the opinion and decree delivered in this cause on the eighth day of this month (December), doth order, that the surveyor of Ross county do go on the land in controversy, and lay off the same as follows: Thomas Massie's entry, by beginning at the mouth of Paint creek, thence up the Scioto, so far as will amount to 520 poles, when reduced to a straight line, and from each end of this base, at right angles from the general course, so far that a line parallel with that general course will produce the quantity of 1400 acres. Robert Powell's entry, by beginning at the upper corner of Thomas Massie's entry, that is, 520 poles from the mouth of Paint creek, thence up the river, so far as will amount to 520 poles, when reduced to a straight line, and from the end of this base line, a line is to be run at right angles to the general course of that portion of the river which is occupied by the base line, and from the beginning with the lines of Thomas Massie, that is, his second and third lines, so far that a line parallel to the general course of this base line, will produce the quantity of 1000 acres. Ferdinand O'Neal's entry, by beginning at the upper corner of Robert Powell's entry, when laid off as aforesaid, thence up the Scioto, so far as will amount to 520 poles, when reduced to a straight line, and from the end of this base line, a line is to be run, at right angles from the general course of that portion of the river which is occupied by the base line, and from the beginning with the second and third lines of Powell, so far that a

Massie v. Watts.

line parallel to the general course of the base line will produce the quantity of one thousand acres. And the court doth further order, that the said surveyor *do make and bound the said survey of O'Neal, when laid off *156] as aforesaid, and make report of the metes and bounds and his proceedings herein to the next court."

At May term 1808, the surveyor having made his report, a final decree was entered in conformity with the principles laid down in the interlocutory order, from which the defendant appealed.

Pope, for the plaintiff in error, contended, that the circuit court in Kentucky had no jurisdiction of a case involving the title of land lying in Ohio, unless it be upon a personal contract. Here was no personal contract. Although the bill states an agreement respecting the surveying of the land, yet it is denied by the answer, and not proved. Besides, if there was such a contract, it is not upon the contract that the suit is brought. It is a mere question which of the parties has the better right, under their several entries. The remedy in chancery, in Kentucky, is merely a substitute for a *caveat*. It is in the nature of a real action, which is local. A court in New York could not try the title of land in Virginia, unless it were upon a personal contract. Even the action of trespass *quare clausum fregit* is a local action, although it sounds in damages, and seems to be of a personal nature.

P. B. Key, contrà.—The bill is for a specific performance of a trust. The party who has the legal estate, by a younger entry, is a trustee for him who had the elder entry; and upon this is founded the jurisdiction of a court of equity. The action is *in personam*, not *in rem*. The remedy sought is, a decree that the defendant should convey the land to the plaintiff. If the defendant refuses to perform the decree, the compulsory process is *in personam*, by way of attachment for a contempt of court. The whole and original jurisdiction of a court of equity is *in personam*, and not *in rem*. But the act of congress is imperative. The circuit court of Kentucky has jurisdiction in all cases at law and in equity between citizens of different *157] states, if *the defendant be found in the district of Kentucky. The same jurisdiction might have been exercised by the state courts of Kentucky.

H. Clay, on the same side.—The question is, whether the nature of the case controls the general expressions of the constitution, and the act of congress? If Watts could not sue Massie in Kentucky, he would be without remedy. He could not sue in Ohio, because the defendant could not be found there.

The ground of jurisdiction is trust. The case also contains the peculiar relation of the parties to each other. Massie was employed by Watts's assignor to locate the land. In this respect it is a case of contract.

Pope, in reply.—The circuit courts of the United States have concurrent jurisdiction with the courts of the state in which they sit. The state courts of Ohio unquestionably had jurisdiction. The circuit court, therefore, of the district of Ohio is the court of the United States which had cognisance of the case.

The Court having intimated an opinion in favor of the jurisdiction of the court below, the counsel proceeded to argue the question of location. But

Massie v. Watts.

as the subject is very intricate, without a copy of the plats in the case, and as the opinion of the court is very full, it is deemed unnecessary to report the arguments of counsel upon that point.

February 28th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This suit having been originally instituted in the court of Kentucky, for the purpose of obtaining a conveyance of lands lying in the state of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree [*158 was rendered.

Taking into view the character of the suit in chancery, brought to establish a prior title, originating under the land law of Virginia, against a person claiming under a senior patent, considering it as a substitute for a *caveat* introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the state in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of *Penn v. Lord Baltimore*, the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vesey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the chancellor says, “This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries.” The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well *as property, was exclusively reserved to the king in [*159 council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree *in rem*, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, *in personam*, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position, he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person, against whom the decree was prayed, be found in England.

In the case of *Arglasse v. Muschamp*, 1 Vern. 75, the defendant, residing in England, having fraudulently obtained a rent-charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made

Massie v. Watt.

liable under his contract, or as trustee. The case, then, as presented to the court, gives it jurisdiction, and the testimony must be examined, to ascertain how far the bill is supported.

The entry of Thomas Massie begins at the junction of Paint creek with the Scioto, and runs up the Scioto 520 poles, when reduced to a straight line, thence off at right angles from the general course of the river, so far that a line parallel thereto will include the quantity. Respecting this entry there is no controversy.

Robert Powell enters 1000 acres of land, "beginning at the upper corner on the Scioto, of Major Thomas Massie's entry, No. 480, running up the river 520 poles, when reduced to a straight line, thence from the beginning, with Massie's line, so far that a line parallel with the general course of the river shall include the quantity."

Then, Ferdinand O'Neal enters 1000 acres of land, beginning at the upper corner, on the Scioto, of Robert Powell's entry, No. 503, running up the river 520 poles, when reduced to a straight line, and from the beginning with Powell's line, so far that a line parallel with the general course of the river shall include the quantity.

As O'Neal's entry depends on Powell's, it is necessary to ascertain the land taken by Powell, before that of O'Neal can be accurately determined.

*164] Had the general course of the Scioto continued *nearly the same, no difficulty would have been found in this case. The surveys might have conformed literally to all the calls of each entry, and each tract would have constituted nearly a rectangular figure with a base of 520 poles on the river, and a back line parallel to that base. But the unexpected bends of the Scioto have deranged the uniformity of this chain of locations, and produced questions of considerable intricacy respecting the ground which must be covered by them.

Thomas Massie's entry being of 1400 acres, and Powell's of only 1000 acres, with a base of the same length on the river, it probably was thought certain, that Massie's upper line would extend beyond Powell's land, and that the line of Powell, which was to run parallel to the river, would intersect Massie's upper line. Powell's entry, therefore, calls to run from the river with Massie's line, so far that a line parallel to the general course of the river will include the quantity. Upon actual survey, the course of the river is found to be such that a line parallel thereto, drawn from the end of Massie's line, would not include 200 acres of land. Under these circumstances Powell must lose between 800 and 900 acres of land, if his entry cannot be so construed as to extend beyond the length of Massie's line.

From the peculiar situation of titles acquired under the land law of Virginia, a law which offered for sale an immense unexplored wilderness, covered with savages equally fierce and hostile, leaving to the purchaser the right to place his warrant, which was the evidence of his purchase, on any land not previously appropriated, and requiring him to make his entries so certainly that any other person might locate the adjacent residuum, it followed, inevitably, that immense difficulties would occur, and that locations must often be lost, or receive that certainty which the law required from principles adapted to the general state of things in the country, but which were not precisely foreseen when the locations were made.

*165] *These principles have been laid down by the courts, and must be

Massie v. Watts.

considered as expositions of the statute. A great proportion of the landed property of the country depends on adhering to them. The great and equitable foundation on which they stand is this: If, by any reasonable construction of an entry, it can be supported, the courts will support it. This principle absolutely requires that all discretion, with respect to the mode of surveying an entry, should be surrendered. For if a location might be surveyed in various ways, then it is vague, and no subsequent locator would know how to enter the adjacent residuum. The court, therefore, is compelled to say in what manner every location, which appears, in its terms, to reserve some power in the locator to vary its form, shall be surveyed.

In the exercise of this essential and necessary power, they have declared, that when a given quantity of land is to be laid off on a given base, it shall be included within four lines, so that the lines proceeding from the base shall be at right angles with it, and the line opposite the base shall be parallel to it, unless this form be repugnant to the entry. The consequence of this principle is, that if the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of certain principles, they will complete it.

They have also decided, that if a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry, may be discarded.

These principles, it is believed, will enable the court to ascertain, in a reasonable manner, the land covered by Powell's location. The beginning is the upper corner of Massie, on the *Scioto. A base line upon the [*166 river is then given, to consist of 520 poles, when reduced to a straight line. Massie's upper line, to its whole extent, if necessary, is also given, and a back line, parallel to the base, is given. The side line opposite Massie's line, and the course from the termination of Massie's line to the back line are wanting, and are to be supplied by construction.

The material inquiry, so far as respects the present cause, is, in what direction shall Powell's upper line, extending back from the river to the line parallel to the general course of the river, be run? That line is not given, and is, consequently, to be supplied by construction. According to the uniform course of decisions, Powell's upper line must project from the base, at right angles with it, unless there shall be some other call in the entry which controls this general principle. It is contended, that it is controlled by the call to run with Massie's line from the beginning. Massie's line not being at right angles with the base line, it is argued, that Powell's opposite line, discarding the rectangular principle, must be parallel to the line from the beginning.

But the court does not concur with the counsel for the plaintiff in error in this opinion. The principle, that the rectangular figure is to be preferred to any other, and is to be preserved, whenever it can be preserved, originates in the necessity of adopting some regular figure, in order to give to locations that certainty which is not always to be found in their terms, and in the superior convenience of that figure over every other, with respect to the adjacent residuum. These motives apply to a part as well as to the whole of an entry. If one location be made upon another, so that the lines of that other bind the entry on one side, and then a precise line be called for from the beginning, to run a certain distance, from the end of which a line is to

Massie v. Watts.

be drawn, and to continue until a line, parallel to the first or base line, or to some given point in *the lines of the person on whom the location is made, shall include the quantity, the same respect for certainty and convenience, which induced originally the adoption of the rectangular figure, would seem to require its adoption with respect to those lines which did not receive a different direction from the positive calls of the location. On one side, there might be several different lines; but this would not seem to demand that, on the opposite side, the same variety should be preserved. It would be departing from the principle unnecessarily, to require that the lines of the opposite side of the tract should be multiplied, in order to be all parallel to the lines by which one side was unavoidably bounded. To the court, it seems, that the rectangular principle is always to be preserved, where it can be preserved, that is, where there is no call in the entry applying to the lines which control them, and that, where it is necessarily departed from, the departure should not be extended further than the necessity requires.

In this particular case, the location does not call for a line parallel to Massie's line, and as Massie's line was to run at right angles from the general course of the river, and it was obviously expected Powell's line would not extend the whole length of Massie's line, it is clear, that the locator expected that Powell's upper line, when at right angles with the course of the river, would be nearly parallel to Massie's line. This may be considered as, in some degree, an auxiliary argument in favor of the opinion which is entertained by this court, that the circuit court did right in laying down the upper line of Powell, at right angles with his base line. This line being established, it is of little importance to O'Neal's claim, in what manner the remaining lines of Powell may be run.

The call of the location, so far as respects the side binding on Massie, is said to stop at Massie's north-western corner. Is that line to be continued? *The conclusive objection to it is, that it would intersect the upper line, before the quantity was obtained, and would, consequently, entirely defeat the call for a back line, parallel to the course of the river.

Is a line at right angles with the general course of the river, to be run from Massie's corner, and continued until a line parallel to the base line would include the quantity? This would be less exceptionable, but it would be departing further from the square, and might, in some instances, exhibit a plat the breath of which would not be one-third of its length. This point, however, is not critically examined, because it is of very little importance in the present cause. The upper line of Powell, on which O'Neal bounds, would be the same so far as it now runs, and should it be continued further, it would only take a small angle of O'Neal's survey as made by order of the circuit court.

The court is of opinion, that Powell's entry is rightly surveyed by order of the circuit court, and it is an additional argument in support of this opinion, that, with the exception of the angle unavoidably made by the interference of Massie, the general form of the land approaches a square more nearly than if laid off in any other manner.

If Powell's entry be correctly surveyed, O'Neal's cannot be laid off otherwise than it is. Were it even to be admitted, that the original survey made for Powell was correct, it is entirely possible, that the case of the plaintiff would not be materially improved thereby. Powell's back line would probably

Massie v. Watts.

terminate on the river; in which event, that would be his upper corner on the Scioto, which is called for as the beginning of O'Neal's entry. O'Neal then calls to run on the river a distance of 520 poles on a straight line, and with Powell's line so far as that a line parallel to the general *course [*169 of the river shall include 1000 acres. Either this entry is rendered totally incapable of being surveyed, in consequence of the call for Powell's line, or it must be so surveyed as to include almost the whole town of Chillicothe, and to take a considerable part of Massie's land. It is, however, unnecessary to inquire what would be the rights of the person claiming O'Neal's entry, in that event, since the court is satisfied, that the survey, as directed by the circuit court, is correct.

The case, then, as made out in evidence, is this: Nathaniel Massie, employed to locate a military warrant for O'Neal, has entered the warrant in pursuance of his engagement. On surveying the entries on which that of O'Neal depended, he either believed that O'Neal's entry was void, from the repugnancy of its calls, or if not absolutely void, was incapable of covering the land which, according to legal construction, and the common understanding of those who might read the entries, it must be considered as covering; or he thought that, by obtaining a prior patent for the land, he might resist any claim which might afterwards be made by O'Neal, or those claiming under him. If Massie really believed that Powell's entry was properly surveyed, and that O'Neal's entry, as made, could not be surveyed, it was his duty to amend it, or, if that was not his duty, to place it elsewhere. For omitting so to do, he is chargeable with such gross neglect of duty as to render him responsible in damages, had his construction of O'Neal's location even been correct. But, if in this he was mistaken, it would be dangerous in the extreme, it would be a cover for fraud which could seldom be removed, if a locator, alleging difficulties respecting a location, might withdraw it and take the land for himself. He, however, has not withdrawn it, except so far as it may be impliedly withdrawn by the survey of 530 acres. With that exception, the entry still covers the land on which it was originally placed, and is still entitled to that land. But Massie, the agent of O'Neal, has entered and surveyed a portion of that land for himself, and obtained a patent for it in his own name. *According to the clearest and best established principles of equity, the [*170 agent who so acts becomes a trustee for his principal. He cannot hold the land, under an entry for himself, otherwise than as trustee for his principal.

So far, then, as O'Neal's land is within Massie's survey, Massie is a trustee for O'Neal and his assignees, and upon the principle stated in the early part of this opinion, the court of Kentucky had jurisdiction of the cause.

But a part of O'Neal's land is surveyed for Powell, and in a contest between his assignees and Powell, the court of Kentucky would have had no jurisdiction. This controversy, however, is not with Powell; it is with Massie, who is the purchaser of Powell's rights. The whole property being thus in the hands of Massie, and the court of Kentucky being in possession of the cause, and having clear jurisdiction of a part of it, which decides the principle on which the whole depends, that court did right in deciding the whole cause, and decreeing to the assignees of O'Neal the whole land originally included in the entry made for him.

United States v. Hall.

Considerable doubts were entertained respecting the right of Watts to more than the unsurveyed part of the entry. But a majority of the court is of opinion that he stands precisely in the place of O'Neal.

As Massie does not show that he had conveyed any of that part of Powell's survey which is included within O'Neal's entry, previous to the institution of this suit, or even now, the allegation that he has conveyed a part of Powell's survey, could not furnish sufficient matter for preventing the decree which was rendered. The decree of the circuit court is affirmed with costs.

Decree affirmed.

*171]

*UNITED STATES v. HALL and WOERTH.

Embargo bond.

If a vessel be driven by stress of weather to the West Indies, and the cargo there detained by the government of the place, this is such a casualty as comes within the exception of "dangers of the seas," in the condition of an embargo bond.¹

United States v. Hall, 2 W. C. C. 366, affirmed.

ERROR to the Circuit Court for the district of Pennsylvania, in an action of debt upon an embargo bond, dated December 29th, 1807, the condition of which was, to reland certain goods in some port of the United States, "the dangers of the seas only excepted."

The vessel on board of which the goods were laden, cleared out and sailed from Philadelphia, for East Portland, in the district of Maine, but having encountered severe and tempestuous weather, her crew disabled in a great degree, she was obliged, in order to escape from the danger of Nantucket shoals, to change her course, and to endeavor to gain the port of Charleston. The weather and the winds, however, were so severe and adverse that she could not make Charleston, nor any other port of the United States, and was obliged to bear away for the West Indies to obtain relief. She arrived at Porto Rico in distress. The governor ordered the cargo to be landed and sold, with which order the master was obliged to comply, and did land and sell the same. She could not leave the island, without considerable repairs, which were accordingly made.

The court below instructed the jury, that these facts, if believed by them, were, upon the whole case, sufficient to bar the United States of their action. The verdict and judgment were accordingly for the defendants, and the United States sued out a writ of error.

The bond was taken in pursuance of the directions of the act of 22d of December 1807, usually called the embargo act (2 U. S. Stat. 451), and before any of the supplemental acts on that subject were passed.

The 3d section of the act of March 12th, 1808 (2 U. S. Stat. 474), provided that in every case where a bond had been given under the act of 22d of December 1807, conditioned to reland the goods, &c., the parties *172] *should, within four months after the date of the same, produce to the collector a certificate of the relanding, &c., on failure whereof, the bond should be put in suit, and judgment should be given against the defendants, "unless proof shall be produced of such relanding, or of loss by sea, or other unavoidable accident."

¹s. p. Durousseau v. United States, *post*, p. 307; The William Gray, 1 Paine 16.

United States v. Hall.

The 7th section of the act of January 9th, 1809 (2 U. S. Stat. 508), usually called the enforcing act, provides that in all cases where, under the act of 22d of December 1807, a bond has been given to reland, &c., the parties shall, within two months after the date of the same, produce to the collector, a certificate of the relanding of the goods, from the collector of the proper port; on failure whereof, the bond shall be put in suit, and judgment shall be given against the defendants, "unless proof shall be given of such relanding, or of loss of the vessel at sea. But neither capture, distress, or any other accident whatever, shall be pleaded or given in evidence in any such suit, unless such capture shall be expressly proved to have been hostile; and such distress or accident occasioned by no negligence or deviation; nor unless such vessel shall have been, from the commencement of the voyage, wholly navigated by a master, mate or mates, mariners and crew, all of whom shall be citizens of the United States, &c."

Rodney, Attorney-General, and *Jones*, for the United States.—In order to excuse the party, he must show that the goods have been actually lost by the dangers of the seas. If the vessel were irresistibly driven by a tempest to Porto Rico, yet the goods arrived there in safety, and were not lost. The party had the full benefit of them, and probably, at a higher price than if he had landed them in the United States. If the law of the 12th of March affects the case, yet it must be a loss by sea, or a loss by other unavoidable accident. When the legislature particularly except certain cases, no other exceptions can be presumed. No loss can be said to be by the dangers of the seas, unless the sea be the proximate cause of the loss. **Greene* [*173 v. *Elmslie*, Peake's Cas. 212; 4 T. R. 783; Bunn. 37. The vested rights of parties may be varied by posterior laws. The prohibition in the constitution respecting *ex post facto* laws, applies only to criminal cases.

Hopkinson, contra.—1. This was a loss by the dangers of the seas: and 2. We are entitled to the benefit of the act of 12th of March 1808, by which unavoidable accident is an excuse.

1. The first embargo law means such a kind of a loss as prevents the relanding of the goods in the United States. It does not mean, where the loss is occasioned by the immediate dangers of the element, but any loss to which vessels are exposed in consequence of the dangers of the seas. Thus, capture by pirates is a loss by one of the dangers of the seas. The expression has the same meaning in the act, as it has in bills of lading. If this action had been upon the bill of lading, instead of the bond, such an accident would have been a sufficient excuse to the master for not delivering the goods. So in a policy of insurance. Abbott 155, Amer. edit.; 2 Roll. Abr. 248, pl. 10; Marshall 418, 1st edit.; Abbott 168; *Garrigues v. Coxe*, 1 Binn. 592; Marshall 488, 2d edit.

The vessel was by the weather forced into Porto Rico. She could not return without repairs. She could not obtain repairs, without leave of the governor. That leave could not be obtained, but by obedience to his orders. His orders prevented the re-landing of the goods according to the condition of the bond.

The case cited from Peake only shows that the loss was within the description of loss by capture, not that it was not a loss by the dangers of the seas. The case *from Bunbury was a mere private trespass; [*174

United States v. Hall.

so was that cited from 4 T. R. 783. It was not an act of the government. The assured had a private remedy against the trespassers.

2. We have a right to the benefit of the act of 12th of March, and are excused, if prevented from relanding by any unavoidable accident. There is a difference, as to *ex post facto* laws, between those which mitigate, and those which increase, the penalty. The act expressly refers to bonds taken under the prior law. It does not mean loss by unavoidable accident, but prevention by such accident. The punctuation of the sentence, as printed in the statute book, favors this construction; but if it be doubtful, the court will lean against the penalty.

But the property was lost to the owner, within the meaning of the statute. He had no power over the thing itself; he could not bring it away. It is immaterial, whether he obtained an equivalent or not; the letter of the condition of the bond could only be satisfied by relanding the thing itself. A compliance with the condition was to him as impossible as if the goods had perished in the sea.

3. The act of January 9th, 1809, cannot apply to this case, so as to make that penal which before was justifiable.

MARSHALL, Ch. J., stopped the counsel, and observed, that the court would never consider the penal act as applying to previous facts, unless such construction be absolutely unavoidable.

March 3d, 1810. MARSHALL, Ch. J., delivered the opinion of the court, *175] as follows:—This suit was instituted on a bond taken in pursuance ^{*of} [the original embargo act, with a condition that the cargo of the schooner Mary, a sea-letter vessel, should be relanded in the port of East Portland, or some other port of the United States, “the dangers of the seas only excepted.” Her cargo was not relanded within the United States, but was carried to Porto Rico and sold. The defendants allege that they were driven by stress of weather into Port Rico, where the cargo was landed by order of the government; and they insist, that the case is within the exception contained in the condition of the bond. The circuit court instructed the jury, that, if they believed the testimony, it was sufficient in law to bar the action. To this opinion, the counsel for the United States excepted; and its propriety is now to be considered.

The improbability of the allegations made by the defendants is no longer the subject of inquiry. The jury have verified them, and the court must receive them as true. The testimony is, that the Mary was driven by tempestuous weather into a foreign port. That, while prosecuting her voyage, she encountered weather which so disabled both the crew and vessel, and put her in such a situation that, to escape Nantucket shoals, “she was obliged to change her course, and endeavor to gain a southern port.” She changed her course, and bore for Charleston. But such was the condition of the crew and of the vessel, and so severe and so adverse were the winds, that she, “could not make Charleston, nor any other port of the United States, and was obliged to bear away for the West Indies, to obtain relief.”

The vessel, then, was driven into Porto Rico by the cause which forms the exception in the condition of the bond, and if the cargo had been lost, at the mouth of the harbor, instead of entering the port, all would admit that the penalty of the bond had not been incurred. But it is contended, that

Campbell v. Gordon.

the dangers of the seas terminated on entering the port, and that no sufficient cause is shown for not bringing back the cargo to the United States. *The case states that the governor of Porto Rico issued an [*176 order that the cargo should be landed and sold, "with which order the master was obliged to comply." As this case is staed, the Mary was driven into Porto Rico, and the sale of her cargo, while there, was inevitable. The dangers of the sea placed her in a situation which put it out of the power of the owners to reland her cargo within the United States. The obligors, then, were prevented, by the dangers of the seas, from complying with the condition of the bond; for an effect, which proceeds, inevitably, and of absolute necessity, from a specified cause, must be ascribed to that cause.

It is the unanimous opinion of this court, that there is no error in the proceedings of the circuit court, and that the judgment be affirmed.

Judgment affirmed.

CAMPBELL v. GORDON and Wife.

Naturalization.

A certificate by a competent court, that an alien has taken the oath prescribed by the act respecting naturalization, raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution of the United States, &c.¹

The oath, when taken, confers the rights of a citizen. It is not necessary, that there should be an order of court, admitting him to become a citizen.

The children of persons duly naturalized, before the 14th of April 1802, being under age at the time of the naturalization of their parent, were, if dwelling in the United States on the 14th of April 1802, to be considered as citizens of the United States.

THIS was an appeal from a decree of the Circuit Court for the district of Virginia, dismissing the bill of the complainant.

The case was stated by WASHINGTON, J., in delivering the opinion of this court, as follows:—

"The object of the bill was to rescind a contract made between the appellant and Robert Gordon, the appellee, for the sale of a tract of land by the latter to the former, upon the ground of a defect of title. The facts in the case, which are not disputed, appear to be as follows: The land which forms the subject of dispute belonged to James Currie, a citizen of Virginia, who died seised thereof in fee, on the 23d of April 1807, intestate, and without issue. James Currie had one brother of the whole blood, named William, who, prior to the 14th day of October, in the year 1795, was a subject of the King of Great Britain, but who emigrated *to the United States, [*177 and on the day last mentioned, at a district court, held at Suffolk, in Virginia, took the oath prescribed by the act of congress, for entitling himself to the rights and privileges of a citizen. At the time when this oath was taken, William Currie had one daughter, Janetta, the wife of the appellee, who was born in Scotland. She came to the United States, in October 1797, whilst an infant, during the life of her father, and hath ever since continued to reside in the state of Virginia. William Currie died prior to the 23d of April 1807.

¹ And see Stark v. Chesapeake Ins. Co., 7 Cr. 420; Spratt v. Spratt, 4 Pet. 393; The Acorn, 2 Abb. U. S. 434.

Campbell v. Gordon.

C. Lee and *F. S. Key*, for the appellant, contended, 1. That William Currie was not duly naturalized. 2. That if he was, yet his daughter Jannetta, being in Scotland at the time of her father's naturalization, was not thereby naturalized.

1. William Currie was not duly naturalized. The certificate of his naturalization was as follows, viz :—

"At a district court, held at Suffolk, October the 14th, 1795, William Currie, late of Scotland, merchant, who hath migrated into this commonwealth, this day, in open court, in order to entitle himself to the rights and privileges of a citizen, made oath, that for two years last past he hath resided in and under the jurisdiction of the United States, and for one year within this commonwealth, and also that he will support the constitution of the United States, and absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, or other state whatsoever, particularly to the King of Great Britain.

"A Copy, *Teste,* JOHN C. LITTLEPAGE."

*178] *The original memorandum made upon the minutes of the court, was as follows :—

"At a district court, held at Suffolk, October the 14th, 1795, William Currie, native of Scotland, migrated into the commonwealth, took the oath," &c.

There was also a deposition of a deputy-clerk, who states that he acted as deputy to Mr. Littlepage, at, before and after the date of the entry respecting Mr. Currie's naturalization. That upon examining the order-books of the said court, he finds the entries made in all cases where persons were admitted to become citizens under the act of congress, at and prior to October term 1795, to be agreeable to the form used in the case of Mr. Currie. That however informal these entries may have been, in not stating that it appeared to the court that the persons who took the oaths were of good moral character, and were admitted citizens; he is sensible every requisite of the law in this, as well as in all other similar instances, was complied with to the satisfaction of the court, and that the omission has been a clerical one. He also finds, from the order-book, that at May term 1796, the form of the entry was altered, so as to express the applicant to be of good moral character, &c.

The application was made under the 2d section of the act of January 29th, 1795 (1 U. S. Stat. 415), which provides, that any alien, then residing within the limits, and under the jurisdiction of the United States, may be admitted to become a citizen, on his declaring, on oath or affirmation, "that he has resided two years at least within and under the jurisdiction of the same, and one year at least within the state or territory where such court is at the time held; that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name, the prince, potentate, state or sovereignty

*179] *whereof he was before a citizen or subject; and moreover, on its appearing to the satisfaction of the court, that during the said term of two years, he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same." "All of which proceedings, required in this

Campbell v. Gordon.

proviso to be performed, in the court, shall be recorded by the clerk thereof."

The first section of the act requires only the oath of the party himself to be recorded ; but the 2d section requires all the proceedings to be recorded. When a matter is directed by act of parliament to be recorded, it cannot be proved otherwise than by record. Peake's Cas. 132. The deposition of the deputy-clerk is not competent evidence, to prove what ought to have appeared upon the record.

It does not appear upon the record, that the court was satisfied as to the moral character of Mr. Currie, or his attachment to the constitution of the United States, or that the court admitted him to become a citizen. They must either show an order of the court for his admission, or they must show that everything has been done to entitle him to become a citizen.

No decision goes further than that the declaration of a competent court that everything has been done according to law, is sufficient, and dispenses with showing how it was done. But the court has not said so, nor does the record show it. Proof of good character, &c., is not a prerequisite to permission to take the oath ; if it was, the admission to take the oath might be considered as evidence that the court was satisfied as to the moral character, &c. His application to the court was not to take the oath, but to be admitted a citizen.

The " &c." in the minutes, might have been extended by the clerk, according to his usual custom ; but this court cannot undertake to extend it, or to say *what it means. Certainly, not without direct and positive [^{*180} proof of its meaning.

2. But if William Currie was duly admitted a citizen, yet his daughter Janetta, being then in Scotland, was not thereby naturalized. The words of the 3d section of the act of 1795 are, "that the children of persons duly naturalized, dwelling within the United States, and being under the age of 21 years, at the time of such naturalization," "shall be considered as citizens of the United States." Janetta, the daughter of William Currie, was not dwelling within the United States, at the time of his naturalization. The words, "at the time of such naturalization," apply as well to the residence of the child as to her age. If the child be naturalized, by the naturalization of the father, she must be naturalized *eo instanti*. It cannot be a naturalization, or not, according to a future event.

The case would rarely happen of a parent coming to this country, residing two years, becoming a citizen, and leaving his children in a foreign country. Congress meant to provide for the more common case of a man coming with his children. They intended, that all that were with him, under age, at the time of his naturalization, should partake of the benefit of his act. But they could not mean, that the naturalization of a father should naturalize all his progeny, under age, wherever they resided. Reasons of policy would forbid it. Their education, manners, habits, prejudices and prepossessions would all be foreign and uncongenial with our manners, principles and systems of government. A child might in this manner become a citizen, without renouncing his title of nobility.

The act of 1795 is to have the same construction *as the act of [*181 1802, § 4 (2 U. S. Stat. 155) ; 2 Tuck. Bl. 249 ; 1 Ibid. part 2, Appendix, 101.

Campbell v. Gordon.

Suoann, contrà.—The “&c.” in the clerk’s minutes, means everything that was necessary to be done to entitle Mr. Currie to become a citizen. If the requisites of the statute were complied with, it required not the order of the court, to admit him to become a citizen. He became such by virtue of the act of congress. The testimony as to moral character, and attachment to the constitution of the United States, may be taken out of court, or the court may be satisfied of their own knowledge. He was naturalized *de facto*, when he complied with the requisites of the act, and the neglect or error of the clerk cannot deprive him of the privileges of a citizen.

It was immaterial, where the child was, if she was under age at the time of her father’s naturalization.

February 20th, 1810. WASHINGTON, J., after stating the case as before mentioned, delivered the opinion of the court, as follows:—

The title of the appellees to the land in question being disputed only upon the ground of the alienage of the female appellee, the court take it for granted that there is no other objection to its validity. It is contended, by the counsel for the appellant, that Janetta, who claims as heir to James Currie, is an alien, inasmuch as she has, by no act of her own, entitled herself to the rights and privileges of a citizen, and cannot claim those rights in virtue of her migration to the United States, and of any acts performed by her father. First, because her father was not duly naturalized; and, secondly, because, if he were, she was not, at the time of her father’s naturalization, dwelling within the United States.

*¹⁸²In support of the first objection, it is contended, that, although the oath prescribed by the 2d section of the act of congress entitled “an act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject,” passed the 29th of January 1795, was administered to the said William Currie, by a court of competent jurisdiction, still it does not appear, by the certificate granted to him by the court, and appearing in the record, that he was, by the judgment of the court, admitted a citizen, or that the court was satisfied that, during the term of two years, mentioned in the same section, he had behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same.

It is true, that this requisite to his admission is not stated in the certificate; but it is the opinion of this court, that the court of Suffolk must have been satisfied as to the character of the applicant, or otherwise a certificate, that the oath prescribed by law had been taken, would not have been granted.

It is unnecessary to decide, whether, in the order of time, this satisfaction, as to the character of the applicant, must be first given, or whether it may not be required, after the oath is administered, and if not then given, whether a certificate of naturalization may not be withheld. But if the oath be administered, and nothing appears to the contrary, it must be presumed, that the court, before whom the oath was taken, was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. It is, therefore, the unanimous opinion of the court, that William Currie was duly naturalized.

McKnight v. Craig.

The next question to be decided is, whether the naturalization of William Currie conferred upon his daughter the rights of a citizen, after her coming to, and residing within, the United States, she having been *a resident [^{*183} in a foreign country at the time when her father was naturalized?

Whatever difficulty might exist as to the construction of the 3d section of the act of the 29th of January 1795, in relation to this point, it is conceived, that the rights of citizenship were clearly conferred upon the female appellee, by the 4th section of the act of the 14th of April, 1802. This act declares, that the children of persons duly naturalized under any of the laws of the United States, being under the age of 21 years, at the time of their parent's being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon. Her father was duly naturalized, at which time, she was an infant; but she came to the United States before the year 1802, and was, at the time when this law passed, dwelling within the United States.

It is, therefore, the unanimous opinion of the court, that, at the time of the death of James Currie, Mrs. Gordon was entitled to all the right and privilege of a citizen; and therefore, that there is no error in the decree of the circuit court for the district of Virginia, which is to be affirmed, with costs.

Judgment affirmed.

McKNIGHT v. CRAIG's administrator.

Plea by administrator.—Costs on reversal.

In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded.¹ In all cases of reversal, if this court directs the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment, with the costs of that court.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of debt, upon a judgment and *devastavit*, brought by McKnight against Craig, as executor of Mitchell.

After an office judgment by default against Craig, and a writ of inquiry awarded, in November 1807, at the rules, Craig died. At the July term 1808, his death was suggested, and a *scire facias* awarded against J. G. Ladd, his administrator. At the July term ^{*1809} (being the fourth term after the office judgment), Ladd appeared by his attorney, and offered to plead a special plea of *plene administravit*, by himself, as administrator of Craig, to which the plaintiff objected, but the court overruled the objection, and admitted the plea to be filed.

The substance of the plea was, that Craig had made a deed of trust of certain real estate, to secure Ladd for his indorsements for Craig, at the bank, by which deed, Craig covenanted to indemnify Ladd. That Ladd had indorsed the notes of Craig to the amount of \$8000, which were discounted at the bank, and continued the indorsements to the time of Craig's death. That the bank had recovered judgment against Ladd, as indorser of some of those notes, to the amount of \$6009, and that Ladd had paid other of the

¹ Janney v. Mandeville, 2 Cr. C. C. 31.

McKnight v. Craig.

said notes to the amount of \$3174, to avoid being compelled by suit to pay the same. That the estate, mentioned in the deed of trust, having been sold, produced only \$4095, whereby the estate of Craig became indebted to Ladd in the sum of \$5188, and so much of the estate of Craig was liable to be retained by Ladd in satisfaction. That Craig was bound to several other creditors, by specialties, in large sums, amounting to \$10,000, and suits thereupon had been brought against Ladd, and were now pending; that he had in his hands personal estate of Craig to the amount of \$960 only, which was liable to be retained by him, in satisfaction of the damage he had sustained by his indorsements for Craig, by virtue of the covenant for his indemnification, and to pay the specialty creditors aforesaid.

To this plea, the plaintiff replied the office-judgment and writ of inquiry awarded against Craig in his lifetime, in this suit; the subsequent death of Craig, and the *scire facias* against Ladd, as his administrator, returnable to November term 1808. The defendant rejoined, that Craig died on the ____ *185] day of ____, in the year 1807. *To this rejoinder, the plaintiff demurred, and assigned as cause of demurrer, that the rejoinder was no answer to the replication, and was a departure from the plea.

The court below being of opinion that the plea was good, and the replication bad, rendered judgment upon the demurrer for the defendant. The plaintiff sued out his writ of error.

E. J. Lee, for the plaintiff in error, contended, 1. That the office-judgment against Craig in his lifetime, was a debt superior in dignity to the debts stated in the plea; and 2. That the defendant, coming in upon *scire facias*, could only plead such plea as his intestate could have pleaded.

1. The office-judgment was regularly obtained, agreeable to the act of assembly of Virginia. (P. P. 80, § 36.) And according to the 42d section of the same act, it became final, after the next succeeding court, it not having then been set aside. It being an action of debt, the judgment was not interlocutory, but final. 3 Bl. Com, 395; 1 Tidd 508. Being a final judgment in the lifetime of Craig, it is entitled to a priority of payment before specialty debts.

2. But if it was only an interlocutory judgment, yet the defendant, upon the *scire facias*, could plead nothing but what the intestate could have pleaded. The act of assembly of Virginia (P. P. 110, § 20) is copied almost *verbatim* from the English statute of 8 & 9 Wm. III., c. 11, and is in these words: "And if the defendant die after such interlocutory judgment, and before final judgment, such action shall not abate, if the same were originally maintainable against the executors or administrators of such defendant, *186] but the plaintiff shall and may have a *scire facias* *against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by the plaintiff, and if such executors or administrators shall appear at the return of such writ, and not show or allege any matters sufficient to arrest the final judgment, &c., a writ of inquiry of damages shall thereupon be awarded, which being executed, judgment final shall be given for the said plaintiff," &c.

After such interlocutory judgment, the intestate could only allege matter in arrest of judgment, and his administrator can only do the same.

McKnight v. Craig.

Upon this point, the case of *Smith v. Harmon*, 6 Mod. 142, and 1 Salk. 315, is decisive.

Swann, contrà.—An office-judgment in Virginia is a very different thing from an interlocutory judgment in England. It may be set aside, as a matter of right, by the defendant, at the next succeeding court, and he may plead any matter whatever, in the same manner as if no such judgment had been rendered. And by the long-established practice of Virginia, he may set it aside, at any subsequent term, by pleading an issuable plea to the merits. It is not true, therefore, that Craig could only have alleged matter in arrest of judgment. He might have pleaded anything that went to show that the plaintiff ought not to recover judgment against him.

Upon the death of the defendant, and the appearance of his administrator, it becomes a new suit, and the administrator ought to be permitted to plead anything that goes to show that the plaintiff ought not to recover judgment against him.

A debt founded upon a *devastavit* is not of so high dignity as a debt upon specialty. It is in nature of damages for a tort. It is a claim depending upon proof of matter of fact *in pais*.

*February 19th, 1810. MARSHALL, Ch. J., delivered the opinion [*187 of the court, to the following effect:—The act of assembly of Virginia, is copied almost literally from the English statute of 8 & 9 Wm. III, c. 11. The case in 6 Mod. is a decision expressly upon that statute, and is precisely in point, that the defendant upon the *scire facias* can only plead what the intestate could have pleaded; and that it is not to be considered as a proceeding against the representative of the deceased, but a continuance of the original action. The plea is such as could not have been pleaded in the original action, and is therefore bad.

The judgment must be reversed, and the cause remanded for the defendant to plead to the original action, if he should think proper.(a)

To a question by *E. J. Lee*, the CHIEF JUSTICE answered, that if the plaintiff in error should obtain a judgment in the court below, it will, of course, be with costs. So, in all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.

(a) The court below considered this case as coming within the act of congress of 24th September 1789, § 31 (1 U. S. Stat. 90), which authorizes the court "to render judgment for or against the executor or administrator, as the case may require." It does not appear, whether that act was taken into consideration by this court.

KENNEDY v. BRENT.

Effect of attachment.

The marshal of the district of Columbia is bound to serve a *subpoena* in chancery, as soon as he reasonably can ; and the service of such subpoena, in case of a chancery attachment, in Virginia, will make the garnished liable, if he pays away the money, after notice of the *subpoena*.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action on the case, by Kennedy against Brent, marshal *188] of the district of *Columbia, for the neglect of his deputy, in not serving a *subpoena* in chancery, commonly called a chancery attachment, in due time, whereby the plaintiff lost his debt.

The declaration stated, that one Johnston, who did not reside in the district of Columbia, was indebted to the plaintiff, a resident of Alexandria, in that district, and that one Hampson was indebted to Johnston ; that in order to subject the money in Hampson's hands to the payment of the debt due from Johnston, the plaintiff, on the 13th of December 1804, filed his bill in chancery, in the circuit court of the district, for the county of Alexandria, and caused to be issued a *subpoena* in chancery against Johnston and Hampson to answer the bill, which *subpoena* was then and there delivered to the defendant's deputy to be executed : and was prosecuted with an intention that the debt due from Hampson to Johnston would be subjected to the payment of the debt due from Johnston to the plaintiff. Nevertheless, the defendant, by his said deputy, not regarding his office of marshal, in the true execution thereof, but contriving and fraudulently intending to hinder the plaintiff of his proper remedy for the recovery of his debt aforesaid, did not serve the said *subpoena* in chancery upon the said Hampson, within a reasonable time after receiving the same to be executed as aforesaid, but neglected to serve the said process, without any reasonable cause for so doing, for a long time, to wit, for the space of four months and upwards, by means of which said neglect, the said defendant altogether lost the effect of his said suit in chancery against the said Johnston and Hampson as aforesaid ; wherefore, the plaintiff saith he is injured, and hath sustained damage, &c.

The defendant pleaded not guilty, and a verdict, by consent, was rendered for the plaintiff, subject to the opinion of the court upon a case agreed, which stated, that on the 13th of December 1804, the plaintiff filed his bill in chancery against Johnston and Hampson, in the common form of a bill for a chancery attachment in Virginia. And that the clerk of the court, at *189] the instance of the plaintiff, issued a process commonly *called a chancery attachment, being a *subpoena* in the common form to answer a bill in chancery, upon which was the following indorsement, viz :

" Memorandum. The object of the bill this day filed in this case is to stay the moneys and effects of the defendant Johnston in the hands of the defendant Hampson, to satisfy a debt due from the defendant Johnston to the complainant. (Signed) G. DENEALE."

That this process, shortly after it was issued, was put into the hands of W. Fox, one of the defendant's deputies, to be executed, and might have been served by him, if he had endeavored to have served the same, but it so happened, that he did not serve the same, and that it afterwards got into the

Kennedy v. Brent.

hands of Lewis Summers, another of the defendant's deputies, who served the same on the 20th day of June 1805, and made the following return thereupon :

"I received this attachment, shortly after it issued, and delivered it to W. Fox, D. M., to serve, who, shortly after, left the town of Alexandria, leaving in the marshal's office two bundles of process, one marked 'process served,' and the other, 'process not served.' In the first bundle, was this *subpoena* in chancery. On or about May or June last, I was informed, it had not then been served. I then examined this process and found it without any indorsement, and took the earliest opportunity to inquire of Mr. Fox as to the service of the *subpoena*, who informed me he did not recollect having served it. I then, on the 20th of June, served the same on Bryan Hampson. The other defendant, Johnson, not found.

(Signed)

L. SUMMERS, D. M."

Whereupon, it was agreed, that the verdict should be subject to the opinion of the court upon the following questions :

1. As the marshal, by his deputy, executed the process, on the 20th of June 1805, before the day appointed *for the return thereof, and returned the same, on the return-day thereof, whether he was in law [*190 bound to have served the same, if in his power so to do, at any time previous to the said 20th of June 1805, unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same, as marshal, on the day on which the said process was issued.

2. Whether the indorsement on the said process of *subpoena* would, after service thereof, create an legal impediment to the payment of the money over to the said Johnston, by the said Bryan Hampson, and would, in case of such payment, after service, make the said Bryan Hampson personally liable for the amount so paid over.

If the court should be of opinion, that the said marshal was not bound to have served the said process, if in his power to do so, at any time previous to the 20th of June 1805 (unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same, as marshal, on the day on which the said process issued), then the judgment is to be rendered for the defendant. And if, under the circumstances mentioned in the second question, the court should be of opinion, that the said Bryan Hampson would not be personally liable for the amount so paid over, and that his not being personally liable would be sufficient to discharge the marshal from any liability in this case, then judgment is to be rendered for the defendant. But if both those questions are decided for the plaintiff, then judgment upon the verdict is to be rendered for him.

The court below was of opinion, that the statement of the case was not full enough to justify a verdict for the plaintiff, and directed judgment to be entered up for the defendant ; whereupon, the plaintiff brought his writ of error.

**Swann*, for plaintiff in error.—The marshal is bound to serve all process put into his hands for service, as soon as possible, and if he does not, he is liable, in a special action on the case, to any party who suffers any injury by his neglect. Bac. Abr. tit. Sheriff. The service of the

Korn v. Mutual Assurance Society.

subpoena in this case would have bound Kennedy, and if he should pay over the money after service of the *subpoena*, he would do it, at his peril. If there should be a decree against him, he could not avoid it, by showing that he paid away the money after notice. The decree would relate back to the time of notice.

E. J. Lee, contrà.—The marshal is not bound to serve process as soon as he can by any possibility serve it, which was the principle which the court below was called upon, by the case stated, to sanction. It is sufficient, in such a case as this, if he serve it, at any time before the return-day. The indorsement is no part of the process. The marshal was not bound to serve that, or to give notice of it to the defendant. All that he was commanded to do was, to summon the defendant to answer the bill, according to the command of the *subpoena*. The indorsement was a mere private notice. It might have been served by any person, and would have been as obligatory upon Hampson as if served by the marshal. This was the opinion of Chancellor Wythe, in the case of *Davis v. Fulton*.

February 28th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The questions intended to be submitted to the court were, 1st. Whether the marshal was bound to serve this process *192] as soon as he reasonably could; and 2. *Whether the service of such process would have made Hampson liable, in case he had paid over the money after such service. On these points, the court has no doubt. But the case is imperfectly stated. It does not appear that the plaintiff has sustained any loss by the neglect of the officer to serve the process, and for this reason—

The judgment is affirmed.

KORN & WISEMILLER v. MUTUAL ASSURANCE SOCIETY against Fire on Buildings, of the State of Virginia.

Mutual insurance company.

The separation of Alexandria from Virginia did not affect existing contracts between individuals.

An insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia.

The obligation of the insured to contribute, does not cease, in consequence of his forfeiture of his policy by his own neglect.¹

All the members of the company are bound by the act of the majority.²

No member can divest himself of his obligations as such, but according to the rules of the society.

ERROR to the Circuit Court of the district of Columbia, sitting at Alexandria.

This was a motion, in the court below, in the name of the principal agent of the Mutual Assurance Society, for judgment against Korn & Wisemiller, for \$116, "being the amount due from them for a half quota, under a declaration for insurance made to the society, with six per cent. interest

¹ Hammel's Appeal, 78 Penn. St. 320; Smith v. Saratoga County Mutual Fire Ins. Co., 8 Hill 508; Hyatt v. Wait, 87 Barb. 29.

² Marshall v. Lycoming Mutual Ins. Co., 51 Penn. St. 402; Burger v. Farmers' Mutual Ins. Co., 71 Id. 422.

Korn v. Mutual Assurance Society.

thereon from the 1st day of June 1805." The court below gave judgment according to the motion, and the defendants brought their writ of error.

This society was incorporated by the legislature of Virginia, by an act passed on the 22d of December 1794, entitled "an act for establishing a Mutual Assurance Society against fire on buildings in this state." The principles of the society were declared to be, "that the citizens of this state may insure their buildings against the losses and damages occasioned accidentally by fire; and that the insured pay the losses and expenses, each his share according to the sum insured." *The act provided that the [193 rules and regulations which should be concluded upon by a majority of the subscribers, at the first meeting, should be binding on all those who should insure their property in that society; and that a majority of the society might at any time alter and amend the rules and regulations as they should judge necessary. That certain premiums should be agreed upon to be paid by the insured, to constitute a fund to pay losses. And that if that fund should not be sufficient, a "re-partition" among the insured should be made, and each should pay, on demand of the cashier, his share, according to the sum insured and the rate of hazard. It also provided, that the property insured should be bound for the payment, and for that purpose might be sold. That such quotas, when called for, should be advertised, and when any person should neglect to pay his quota, his insurance should cease, until it should be paid. If the property should be sold, the purchaser was to become a subscriber in lieu of the vendor. The subscribers might be compelled to pay the premiums, on request of the cashier, with six per cent. interest to the day of payment.

By a subsequent act, passed in December 1795, it was enacted, "that the said subscribers, a majority of them, in person or by deputation, being present, or a majority of the sum subscribed, when any meeting shall be held, being there represented, shall have power and authority to proceed and act in all matters and things in the first recited act mentioned, in as full, absolute and unlimited a manner as they might or could do, if all and every of the said subscribers were actually present and attending at any such meeting."

By an act passed the 12th of January 1799, it was enacted, "that the said mutual insurance society shall have full power to recover the whole, or any part of such premiums or quotas as are, or may hereafter become, due from any delinquent subscriber or member, under his subscription or declaration for insurance made to the said society, on motion of the cashier of the society, before the court of the county, or the court of the district wherein such delinquent may reside, ten *days' notice of such motion being previously given; and such court shall have full jurisdiction [194 to hear and determine such motion, and to cause their judgment to be enforced, with costs, by any legal executions; saving to any person, against whom a motion shall be made, the right of a trial by jury, if he shall desire it."

By an act passed the 27th of January 1803, it was enacted, "that the said society may insure buildings in the county of Alexandria, provided congress shall pass a law subjecting those who declare for insurance in that society to the provisions and regulations of the laws of Virginia, which are already, or may hereafter be, passed concerning the said society. The act to commence and be in force as soon as congress shall pass a law subjecting

Korn v. Mutual Assurance Society.

the citizens of the county of Alexandria who shall hereafter subscribe for insurance in the said society, to the same mode of recovery in the court of the county of Alexandria, as is now allowed and granted by the laws of this commonwealth against defaulting subscribers residing within this state." On the 3d of March 1803, congress passed such an act as was contemplated by the legislature of Virginia.

On the 29th of January 1805, Virginia passed an act, the preamble to which recited, that it had been represented on the part of the society, that such a change in their constitution as would separate the interests of the inhabitants of the towns from the interests of the inhabitants of the country, was essential to the "equalization" of the risks, and that the same had been agreed upon at a general annual meeting of the society. It therefore enacted, that the funds should be divided between the towns and the country, in proportion to the capital subscribed by the towns and country, respectively, and, that the town funds should be only liable for town losses, and country funds for country losses. That during the year 1805, all the valuations of houses insured should be revised, and no loss paid but according to such re-valuation, subject to a deduction of one-fifth thereof; "and where such re-valuation shall exceed the former valuation, an additional premium shall be paid."

*That "it shall be lawful for any member of this society to withdraw [195] draw from the same, on giving six weeks' previous notice, and upon paying all arrearages due at the time of withdrawing."

"That all debts due, or to become due, to the society, may be sued for, prosecuted, and recovered, in the name of the society, in the same manner, in the same courts, and upon the same principles, as they may now be sued for, &c., except that the name of the cashier need not be used. That the agents, &c., shall perform the duties required from agents by the 19th article of the rules and regulations now in force."

By the 19th article of the rules and regulations of the society, adopted and in force prior to the 29th of January 1805, the duties of an agent were "to act for the society agreeably to the constitution, to apply to the house-owners of their respective counties, explain the plan to them, make out the declarations of insurance, procure the certificate of the majority of three respectable house-owners (of whom the county agent may be one) of the valuation of the buildings, transmit the declarations, properly executed, to the principal agent, and correspond with him on what may be necessary to be done."

The plaintiffs in error made their declaration for insurance, in the usual form, under seal, and thereby promised that they would "abide by, observe and adhere to the constitution, rules and regulations which were already established, or might thereafter be established, by a majority of the assured, present in person, or by representatives, or by a majority of the property insured, represented either by the persons themselves, or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be holden by the assurance society, or which were, or thereafter might be, established by the president and directors of the society."

In consequence of this declaration, the plaintiffs in error paid the original premium of insurance and obtained *a policy. The society demanded [196] a half quota; "that is to say, for the payment, as it existed on the 25th

Korn v. Mutual Assurance Society.

of February 1805, of a sum equal to one-half of the original premium, which half quota was required to be paid on the 1st of April 1805, and is the sum for which judgment is now claimed."

By the 14th article of the original rules and regulations of the society, it was provided, that, "In every period of seven years from the commencement of this institution, there shall be new declarations and valuations for insurance upon buildings insured by this society, and whoever fails to renew his declarations and valuations, for the space of three months from the expiration of each term of seven years, shall cease to enjoy the benefits of his assurance, till such new declarations are made; should the valuation be less than before, the assured shall have no right to demand of the society the difference of the premiums, but it shall remain for the benefit of the society, and in case of any loss, the insured are always to be paid according to the last valuation."

Korn & Wisemiller did not, within three months after the expiration of the first term of seven years, renew their declaration and valuation, and thereby ceased to enjoy the benefit of their insurance.

The town and county of Alexandria, in which these buildings were situated was, until the 27th of February 1801, a part of the state of Virginia, since which day, they had constituted a part of the district of Columbia. The plaintiffs had always been inhabitants of the town of Alexandria ever since the year 1789.

On the 25th of December 1795, the society commenced the operations of the institution. In pursuance of the act of Virginia of the 29th of January 1805, a separation of the interests of the inhabitants of the towns from the interests of the inhabitants of the country, had been made in the manner expressed in the 1st, 2d, 3d, 4th, 5th and 6th sections. *The new constitution in that act contained, went into operation on the 30th of January 1805. The plaintiffs in error made a declaration of re-valuation of the property insured by them, which declaration was under their seals, and was produced and made in consequence of the representations of the agent of the society, who stated, that the plaintiffs in error, were bound by their former declaration, and by the rules and regulations of the society, so to do.

C. Lee, for the plaintiffs in error, contended, 1. That they were not members of the company on the 25th of February 1805, when the demand was made. By the cession of the district of Columbia to the United States, the town of Alexandria ceased to be in Virginia, so that the plaintiffs in error were not Virginians, nor was their property in Virginia, and one of the fundamental articles of the charter would thus be violated, if the property should continue to be insured.

By accepting the new charter, the old was dissolved, and no person could be a member of the new company, unless by a new declaration, and by accepting a new policy.

2. That the re-valuation, and new declaration did not bind the plaintiffs in error, because it was made under a misrepresentation made by the agent of the society; and it is immaterial, whether it were a misrepresentation as to the fact or as to the law.

By the charter, the assured only were to be considered as members of

Korn v. Mutual Assurance Society.

the company. When a person ceased to be assured, he ceased to be a member, and was no longer liable to new calls. If the property of Korn & Wisemiller had been destroyed by fire, after the 27th of February 1801 (the day of the separation of Alexandria from Virginia), the society would not have been liable ; Korn & Wisemiller, thereupon, cannot be liable for a [198] share of the losses which have happened *since that time. It was a fundamental principle of the charter, that the insurance should be mutual.

The act of congress of the 27th of February 1801, which adopts the laws of Virginia as the laws of that part of the district of Columbia, does not aid the society, for the law of Virginia authorized insurance to be made upon houses in Virginia only. Any person might withdraw from the company, by refusing to pay a quota, or by refusing to accept a policy.

Swann, contrà.—The original charter gave the majority of the members a right to bind the residue, as well by alterations in the charter itself, as by rules, by-laws and regulations ; a majority could accept a new charter, and thereby bind all the members.

The cession of the district of Columbia did not destroy private rights ; it only changed the political relation of the inhabitants.

No person could withdraw from the company otherwise than by the mode pointed out in the act of Virginia, after giving the notice prescribed. The suspension of the insurance of a person refusing or neglecting to pay his quota, is a mere penalty, he does not cease to be a member, he still remains liable for his share of the losses, notwithstanding the suspension of his own insurance.

If there was a misrepresentation by the agent of the society, it was a misrepresentation of a principle of law, which the plaintiffs in error were bound to know as well as the agent. They were members of the company, and ought to have known all the obligations they contracted as such. Fonbl. Eq. 108 ; Doct. & Stud. 1, 46, 309 ; Woodd. 608 ; Buller 31.

JOHNSON, J., delivered the opinion of the court, as follows :—This cause [199] comes up from the circuit court of Alexandria, *in which a summary judgment has been given, for the recovery of a contribution demanded of the members of the mutual assurance society conformable to its by-laws.

The plaintiffs here contest their liability upon several grounds. 1. Because, by the separation of Alexandria from the state of Virginia, they virtually ceased to be members of the institution. 2. That, by having omitted to re-value within seven years, they were no longer insured, and, of consequence, not liable to contribute. 3. That, by the alteration of the charter, in 1805, their security and liability became so materially changed, as to discharge them from their contract. 4. That their re-valuation in 1805 ought not to be obligatory upon them, because they were deluded into it by false or incorrect suggestions. 5. That they are not liable, under the description of persons who had insured prior to 1804, as they ought to be considered only as having insured at the time of their re-valuation.

On the first of these points, the court are of opinion, that the separation of Alexandria from the state of Virginia could have no effect upon existing contracts of individuals. Such divisions of territory are entirely political ;

Korn v. Mutual Assurance Society.

a separation of jurisdiction takes place, but private interests and private contracts remain unaffected, and every individual relation continues the same, except that of being associated under the same government. The circumstance, that the law of Virginia has limited the company to the bounds of the state, in performing its functions, could only prevent them from making new contracts, subsequent to the separation, and until they had received additional powers, *but could not release them from their liability to individuals with whom they had previously contracted. [*200 Nor can the circumstance of the members of the legislature being authorized to represent their respective counties, affect the case ; for, although the Alexandria property could no longer be represented in that mode, there was nothing to prevent their appearing in person, or by proxy, at the meetings of the company.

The court are further of opinion, that all the other grounds assumed by the plaintiffs are equally untenable. Although, at the first view, it would appear reasonable, that he who is not insured, is not bound to contribute, yet there may exist strong reasons why, under the peculiar organization of this company, a different rule should be adopted ; and certain it is, that the individual may, by his own act, subject himself to such a state of things. The liability of the members of this institution is of a twofold nature. It results both from an obligation to conform to the laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive : " We will abide by, observe and adhere to the constitution, rules and regulations which are already established, or may hereafter be established, by a majority of the insured, present in person, or by representatives, or by the majority of the property insured, represented either by the persons themselves, or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society, or which are, or may hereafter be, established by the president and directors of the society." It would be difficult to find words of more extensive signification than these, or better calculated to aid, explain and enforce the general principle, that the majority of a corporate body must have power to bind its individuals. It is true, that the words of this declaration, as well as the general power of a corporate body, must be restricted by the nature and object of its institution ; but apply this rule to the case before us, and it cannot avail the [*201 plaintiffs, for both the rule which suspends the security, *and the alteration made in its constitution, under a vote of the majority, are strictly conformable to the general objects for which the company was instituted.

We are of opinion, that whilst Korn & Wisemiller continued members of the society, they remain subject to the general liability which that state imposes ; and that, after becoming members, their ceasing to be so must be determined by the rules of the society, which rules, so far as we are at present advised, admit of only two cases ; one is, where the house insured is consumed by fire, and the other, upon giving the notice, and conforming to the other regulations imposed by the by-laws.

It is observable, that the rule which imposes the necessity of a septennial valuation of the property insured, does not contemplate a total rescission or

Atkinson v. Mutual Assurance Society.

annihilation of the contract ; on the contrary, it is express in declaring that, upon a re-valuation being made, the party shall continue insured, by virtue of his former policy. We, therefore, consider this suspension of his security merely as a penalty imposed upon the member, for neglecting to conform to a rule of the society. And it is certainly much more reasonable, that he should be subject to a loss or inconvenience for his own neglect, than that he should be released from his liability to the society, in consequence of it.

As to what is contended to be a material alteration in their charter, we consider it merely as a new arrangement or distribution of their funds ; and whether just or unjust, reasonable or unreasonable, beneficial or otherwise, to all concerned, was certainly a mere matter of speculation, proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured. Certainly, the general submission which they have signed will cover their liability to submit to this alteration.

* The view which we have taken of this subject affords an answer *202] to the fifth ground, and, in a great measure, to the fourth. We consider the insured, upon every re-valuation, as in under his former right of membership, and, of consequence, that the plaintiffs come under the description of persons who had insured before 1804 ; and, for the same reason, the representation of Scot (could any effect at all be given to the circumstances to which he testifies) was true, as to the membership of the plaintiffs, and as to their liability in that capacity. They must have known it was a question of law, on which Scot possessed no power to commit the society, and on which the plaintiffs themselves ought to have been as well informed as any other individual.

Judgment affirmed.

ATKINSON v. MUTUAL ASSURANCE SOCIETY against Fire on Buildings, of the State of Virginia.*Mutual insurance company.*

The additional premium upon a re-valuation, under the rules of the society, is only upon the excess.

THIS case differed from the case of *Korn & Wisemiller v. The Mutual Assurance Society* ; that being for a half quota, and this for the additional premium upon a re-valuation, under the 7th section of the act of 1805. (See *Virginia Laws*, vol. 2, App. 81.)

The question (which was submitted without argument) was, whether the additional premium should be charged on the whole sum at which the buildings were re-valued, or only on the excess between the old and new valuation.

JOHNSON, J.—The court is of opinion, that the rule on the subject of premium imposes the additional premium only on the excess of the re-valuation beyond the former valuation.

Judgment reversed.

*The Ship HELEN.

UNITED STATES v. The Ship HELEN.

Seizures.

A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute. The General Pinkney, 5 Cr. 281, re-affirmed.

THIS was an appeal from the sentence of the District Court of the United States for the district of New Orleans, which dismissed the libel.

The ship Helen, a vessel of the United States, during the existence of the act of congress of the 28th of February 1808, "to suspend the commercial intercourse between the United States and certain ports of the island of St. Domingo," had traded with one of the prohibited ports, contrary to that act. The act was suffered to expire on the 25th of April 1808. Afterwards, to wit, on the 20th of September 1808, she was seized, on account of that violation of the act, by the collector of the port of New Orleans; but the libel was dismissed by the judge, on the ground, that the law had expired. The United States appealed.

The case was now submitted without argument; and upon the authority of the case of *The General Pinkney*, at last term—

The sentence was affirmed.

STEWART v. ANDERSON.

Set-off.

In an action, in Virginia, by the assignee of a negotiable promissory note, against the maker, the latter may set off a negotiable note of the assignor, which he held, at the time of receiving notice of the assignment of his own note, although the note thus set off was not due, at the time of the notice, but became due, before the note upon which the suit was brought. Stewart v. Anderson, 1 Cr. C. C. 586, affirmed.

ERROR to the Circuit Court for the district of Columbia. Stewart, the indorsee of a promissory note, brought his action of debt, under the statute of Virginia, against Anderson, the maker. The note was made payable to W. Hodgson, and by him assigned to Stewart. It *was dated the [**204 25th of April 1807, and payable 180 days after date, for \$330.56.

The defendant pleaded, 1. *Nil debet*: and 2. That at the time the note became due, and before the defendant had notice of the assignment thereof to the plaintiff, by W. Hodgson, the latter became, and then was, indebted to the defendant in the sum of \$566.67, by note, dated the 29th of June 1807, and payable 60 days after its date. That the defendant had been, and still was ready and did offer to set off against the money due from him by the note mentioned in the declaration, so much of the \$566.67, as would be and was sufficient to discharge all that was due and owing from him for and on account of the note in the declaration mentioned.

Upon the trial in the court below, the jury found a special verdict, which stated, that Hodgson transferred to the plaintiff the note in the declaration mentioned; and afterwards, on the 14th of August 1807, for the first time informed the defendant, that the note was transferred, but did not say to whom. At the time of that information, the defendant held a note of W.

Stewart v. Anderson.

Hodgson, dated the 29th of June 1807, for \$566.67, which was given for a full and valuable consideration, and payable 60 days after date. When the defendant was informed of the transfer of the note, he made no reply. The jury finally concluded by saying, that they "find for the defendant, provided the court are of opinion, that the verbal notice given by Hodgson to the defendant, on the 14th of August, of the transfer of the note in the declaration mentioned, was not sufficient to bar the defendant's right of offsetting his aforesaid note of \$566.67 against the plaintiff's note in the declaration mentioned. But should the court be of opinion, that the said notice was sufficient to entitle the plaintiff to the money in the declaration mentioned, as against the defendant, then they find for the plaintiff," &c.

*Upon this special verdict, the judgment of the court below was
[205] for the defendant ; and the plaintiff brought his writ of error.

Youngs, for the plaintiff in error, contended, that the note offered in discount was not a good set-off, because it was not payable at the time the defendant had notice of the assignment. The act of assembly of Virginia (P. P. 36) provides, that "assignments of bonds, bills and promissory notes, and other writings obligatory for payment of money or tobacco, shall be valid ; and an assignee of any such may thereupon maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant." Under this act of assembly, it must be a just discount, before notice ; this could not be a just discount, until it became payable. Money cannot be set off, before it be due. The act of assembly was not intended to embrace commercial cases. If it did, it would destroy the negotiability of notes, and all credit and confidence in mercantile transactions.

THE COURT stopped *E. J. Lee*, contrà.

MARSHALL, Ch. J.—If Hodgson's note had not been payable until after Anderson's, it would have been a different case ; but being payable before Anderson's, and holden by Anderson, before notice, it is such a set-off as he might avail himself of at the trial.

Judgment affirmed.

*MARINE INSURANCE COMPANY OF ALEXANDRIA *v.* HODGSON.

Error.—Amendment.—Plea in covenant.—Proof of condemnation.—Parol evidence.

The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error.¹

After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer.

In an action of covenant on a policy under seal, all special matters of defence must be pleaded.

Under the plea of "covenants performed," the defendant cannot give evidence which goes to vacate the policy.

In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence.

It is a bad practice, to read the proceedings at length. The depositions stated in such proceedings are not evidence, in an action upon the policy of insurance.

In an action upon a valued policy, it is not competent for the underwriters, to give parol evidence, that the real value of the subject insured is different from that stated in the policy.

ERROR to the Circuit Court of the district of Columbia. The former judgment of the court below in this cause, in favor of the now plaintiffs in error, having been reversed in this court, and the cause sent back for the trial of the issues of fact (5 Cr. 100), the plaintiffs in error, before the cause could be regularly called for trial according to the rules and practice of the court, moved the court below for leave to amend the pleadings, by adding to the former eight pleas, a ninth and a tenth plea, in the words following :

9th plea. And the said defendants, by their attorney aforesaid, by leave of the court, and by virtue of the statutes in such cases made and provided, for further plea in this behalf say, that the said plaintiff ought not to have and maintain his action aforesaid against them, because they say, that the said marine insurance company (by the act of assembly of Virginia incorporating said company, which act of assembly they now bring here into court) are authorized to make rules and regulations for the conducting the business of the said corporation, and that one of their said rules and regulations requires that every order for insurance shall be made in writing, and shall contain the name of the vessel and master, the place from whence, and to which, insurance is required to be made, with as full a description of the vessel and voyage as can be given thereof, and especially as to her age, tonnage and equipment ; and that it was always and is the practice of the said insurance company to make no insurance upon the body of a ship, her tackle, apparel and furniture, beyond the reasonable value thereof, according to the representation and description given thereof as to her age, tonnage and equipment, which rule and practice diminishes the risks of insurance in regard to losses contrived, designed, effected and concealed by the insured, when they are greatly over insured ; and that the said rule [*207] and practice was, at the time of making and concluding the contract aforesaid in the declaration mentioned, well known to each of the said parties making the said contract ; and that to induce them, the said defendants, to sign, seal and deliver the aforesaid policy of insurance, thereby insuring to

¹ Walden *v.* Craig, 9 Wheat. 576 ; Chirac *v.* Breedlove *v.* Nicolet, Id. 413 ; Silver *v.* Bank Reinicker, 11 Id. 280 ; United States *v.* Buford, of Pittsburgh, 16 How. 571 ; Spencer *v.* Lapsley, 3 Pet. 12 ; Pickett *v.* Legerwood, 7 Id. 144 . ley, 20 Id. 264.

Marine Insurance Co. v. Hodgson.

the value of \$8000 upon the body, tackle, apparel and other furniture of the brigantine Hope aforesaid, he, the said plaintiff, in effecting the said policy, on the 30th of September, in the year 1799, at the county aforesaid, stated and represented, that the said brigantine, in the month of July in the year last mentioned, was a stout well-built vessel of about 250 tons burden, in good order, and well found in sails, rigging, &c., built in Massachusetts, and from six to seven years old, and requested an insurance upon the said brigantine, her tackle, apparel and furniture, rating her value at the sum of \$10,000, for the voyage in the declaration mentioned, at the commencement of the risks to be insured. And the plaintiff represented to the defendants, on the same 30th day of September, in the year 1799, at the county aforesaid, that the said brigantine, her tackle, apparel and furniture, were of the value of \$10,000, at the time the risks of the voyage to be insured by the contract aforesaid, would commence ; and the defendants aver, that in consequence of the said representation, and placing full faith and credit therein, they were induced to sign, seal and deliver, and did sign, seal and deliver, the said policy of insurance, on the said 30th day of September, in the year aforesaid, at the county aforesaid, to the plaintiff, thereby agreeing in the said policy to fix the value of the said brigantine, her tackle and apparel and other furniture, at the sum of \$10,000, and thereby insuring to the amount of \$8000, for the voyage aforesaid, upon the said brigantine, her tackle, apparel and furniture. And the said defendants further aver, that the said brigantine Hope was not, in the month of July, in the year aforesaid, or at any time, a well-built vessel of the burden of about 250 tons, and was *not from six to seven years old, in the said [208] month of July, in the year aforesaid, but was much older than from six to seven years old in the said month of July, in the said year, that is to say, more than eight and a half years old, and had been ill-built in the year 1790, in the province of Maine, in Massachusetts, and thereafter was raised upon and rebuilt ; that the value of the said brigantine, her tackle, apparel and furniture, was never, at any time whatever, equal to one-half the said sum of \$8000. And the defendants say, that the difference aforesaid between the true build, age, tonnage and value of the said ship, and the aforesaid represented build, age, tonnage and value thereof, was material in regard to the risks of the voyage in the said policy of insurance mentioned, and this they are ready to verify ; wherefore, they pray judgment, &c.

10th plea. And the said defendants, by their attorney aforesaid, by leave of the court, and of the statutes in such cases made and provided, for further plea in this behalf say, that the said plaintiff ought not to have or maintain his action aforesaid against them, because they say, that the said policy of insurance was had and obtained of them, by means of the fraud of the said George F. Straas in the declaration mentioned, with intent to deceive and defraud the said defendants of a large sum of money, that is to say, of the difference between the just and fair value of the said brigantine, her tackle, apparel and furniture, and the sum of \$8000 intended to be insured by the said policy, which difference exceeded one-half the sum last mentioned, that is to say, exceeded \$4000, and this they are ready to verify ; wherefore, they pray judgment, &c.

But the court below refused to permit the pleadings to be so amended (1 Cr. C. C. 569), in consequence of which, the cause went to trial upon the

Marine Insurance Co. v. Hodgson.

three issues of fact which had already been joined, viz: 1. That the defendants "have well and truly done *and performed all things they by the said policy of insurance were bound to perform;" 2. That the brigantine Hope "was not taken and seized by certain British vessels, and carried into Jamaica, and there libelled, condemned and sold in manner and form as in the declaration is set forth;" and 3. That the brigantine Hope was not, when she sailed from her last port in the island of St. Domingo, on the voyage insured, a good, sound, staunch, seaworthy ship, able to perform the voyage insured.

Upon the trial of these issues, the defendants offered evidence of the facts stated in the ninth and tenth pleas, which the court rejected, as inapplicable to either of the issues. To which refusal, the defendants excepted.

The defendants also offered, in mitigation of damages, evidence to prove that the vessel, at the time she sailed upon the voyage insured, was not worth one-half the sum insured, and that the high valuation in the policy was produced by an untrue and unfair representation, on the part of the assured, of the age, tonnage and build of the vessel, and that the misrepresentation in those respects was material to the contract of insurance; and thereupon prayed the court to instruct the jury, that if they found the facts to be so, they ought not to take the valuation stated in the policy as the true value of the subject intended to be insured, but in assessing the damages of the plaintiff, they ought to take the just value of the said brig, &c., at the commencement of the risk insured, although all the issues of fact should be found for the plaintiff. Which instruction the court refused to give, having already instructed the jury, in case they should find the issues for the plaintiff, to reserve for the decision of the court, the question as to the principle upon which the damages should be estimated and assessed. To which refusal, the defendants also excepted.

The plaintiff, for the purpose of proving the libel *and condemnation in the declaration mentioned, produced and read to the jury, without objection, at the time, on the part of the defendants, a copy of the whole record and proceedings in the vice-admiralty court at Jamaica, respecting which the counsel for the parties had entered into the following agreement, viz: "The defendants waive all exceptions to the authentication of the record of the proceedings in admiralty, concerning the condemnation of the brig Hope, but save every objection to the contents of the said record, excepting the matter of authentication. The plaintiff admits, as evidence, the affidavits of Gibson and Evans."

After the reading of which, the defendants, in order to prove that the vessel was not, at the time of capture, in the due course of the voyage insured, and the condition she was then in, offered to read in evidence to the jury, from the said record of proceedings, a copy of the deposition of William Murray, taken *in preparatorio*, to be used in the said court of vice-admiralty. But the court instructed the jury, that the said deposition of the said William Murray, so taken, was not competent evidence in this cause to prove the said facts. To which instruction, the defendants excepted.

The plaintiff moved the court to direct the jury, that if, from the evidence, they found all the issues of fact for the plaintiff, then they should find their verdict in the following form, viz: "We of the jury find all the issues of fact joined in this cause for the plaintiff, and do assess his damages

Marine Insurance Co. v. Hodgson.

by reason of the breach of covenant in the declaration mentioned, to the sum of _____. The amount of damages so assessed to be nevertheless subject to the opinion of the court upon the following point reserved, viz., if the value fixed in the policy, set out in the declaration, be not conclusive upon the parties, and it be competent to the jury, under any of the issues of fact joined in this cause, to hear evidence concerning, and to inquire into, the real value of the vessel in the said policy mentioned, so as to reduce the *211] agreed value mentioned in the said policy, and *to estimate the plaintiff's damages according to such reduced value, as actually proved, then, and not otherwise, we assess the plaintiff's damages (in lieu of the sum above assessed) to the sum of _____. To which direction, the defendants objected, and prayed the court, if they gave the jury any instruction upon the subject, to direct them to find the smaller sum in damages, if the court should be of opinion, that it was competent for the jury to hear evidence concerning the misrepresentation as to the age, build and tonnage of the vessel.

But the court refused to give the instruction prayed by the defendants, having before refused to suffer the defendants to give evidence of misrepresentation by the plaintiff in obtaining the policy, under either of the issues of fact joined in this cause, to which refusal the defendants had taken a bill of exceptions. But the plaintiff having consented to permit the defendants to give evidence of the real value of the vessel, at the time the risks insured commenced (saving the objection to the competency of any parol evidence upon any of the said issues of fact, concerning the real value of the said subject insured), the court directed the jury to find their verdict as prayed by the plaintiff. To which refusal and instruction, the defendants excepted.

The jury found a verdict in the form directed by the court, and filled the first blank with the sum of \$11,452.34, and the other with the sum of \$6441.71. The court, after consideration, rendered judgment for the largest sum, being of opinion, that the value stated in the policy was conclusive between the parties. The defendants brought their writ of error.

C. Lee, for the plaintiffs in error. 1. The court below ought to have permitted the additional *pleas to be filed. When a cause is sent back *212] from this court with a mandate "that such further and other proceedings be had in the said cause, as, according to right and justice and the laws of the United States, and agreeably to the judgment of the said supreme court, ought to be had," it is open to all amendments, as if it were an original cause, and as if the former plea had been adjudged bad by the court below in the first instance.

Amendments are permitted, even after judgment upon demurrer, according to the discretion of the court. And this court will reserve the judgment of the court below, if it has not soundly exercised its discretion. *Wilkins v. Despard*, 5 T. R. 112; *King v. Grantford Corporation*, 7 Ibid. 703; *Resler v. Shehee*, 1 Cr. 117; *Downman v. Downman*, 1 Wash. 26; 1 Burr. 317, 322; 1 Wash. 313; *Pollard v. Dwight*, 4 Cr. 433.

The 9th plea was different from any before offered. And it was not necessary that the plea of fraud should have been more specific. 3 Wentw. 414; *Wiscart v. D'Auchy*, 3 Dall. 321; 1 Woodd. 207; *Ferrer's Case*, 3 Co. 77.

The court ought to have received evidence of fraud and misrepresenta-

Marine Insurance Co. v. Hodgson.

tion, upon the first issue, which was in the nature of a general issue. The plea might, perhaps, have been adjudged bad upon demurrer; but it is aided by the joinder of issue upon it, and everything which could show that the defendants were not bound by their covenant to do anything, was admissible upon this issue. System of Pleading 321; 5 Com. Dig. tit. Pleader, E. pl. 37, C; 5 Esp. Rep. 38.

If the evidence was not directly admissible upon either of the issues, it ought still to have been received in mitigation of damages. The contract of insurance is only a contract for indemnity; and if, upon a total loss, the assured receive the full value of the subject *insured, it is all that he can in equity and good faith require. *Da Costa v. Firth*, 4 Burr. 1966; *Grant v. Parkinson*, Cowp. 583. In this very case, this court has intimated an opinion, that the misrepresentation might be a subject of consideration in inquiring of damages. Upon a total loss, the value stated in the policy is only *prima facie* evidence. Marshall 110, 111, 199, 612, 701; *Saddlers' Company v. Babcock*, 2 Atk. 554.

The court ought to have admitted the deposition of Murray to be read from the record of the vice-admiralty. By the British treaty, the whole proceedings are made evidence.

This court also erred in rendering judgment upon the verdict for the larger sum. It was competent for the jury to hear evidence of the real value of the vessel, and to assess damages accordingly.

Swann, contrâ.—The court below committed no error in rejecting the 9th and 10th pleas. They were offered after the cause had been remanded from this court. There will be no end to delay, if the party be permitted to amend, after judgment against him upon a writ of error.

As a matter of discretion also, the court did right in rejecting the 9th plea. They ought not to have indulged the defendants with filing a plea, at that late stage of the cause, which tendered the same issue which they had refused to join, when tendered by the plaintiff, in his replication to the 6th plea. Besides, the matter of the plea was covered by the implied warranty of seaworthiness; for if the facts stated in the plea were at all material, they must have been so only in regard to the ability of the vessel to perform the voyage. The substance of this plea was, therefore, included in the issue of seaworthiness.

The admission or rejection of a plea, after an issue *is joined, is not an error for which the judgment can be reversed. It is a mere matter of discretion; the party can have no legal ground to insist upon it. 7 T. R. 703. The principle that this court will not reverse a judgment for a proceeding in the court below, which was within its discretion, has been decided in regard to the continuance of causes, and the granting new trials.

If it be a case in which a writ of error lies, still no error was committed by the court in the exercise of its discretion in rejecting the 10th plea. It is not a direct allegation of fraud, nor does it aver that any damage was sustained by the defendants, in consequence of the fraud. The plea is not sufficiently explicit in charging the fraud; it does not state in what particulars the fraud consisted. Neither of the pleas could be considered as a fair plea to the merits; they must have produced demurrers, and additional delay.

Marine Insurance Co. v. Hodgson.

There was no error in rejecting the evidence of the facts stated in the 9th and 10th pleas, because there was no issue to which those facts could apply.

The plea that the defendants had performed all that they were bound to perform, must be considered as an averment of a matter of fact, not of a matter of law. The only act which the defendants were bound to perform was to pay the money, if a loss happened. The plea, therefore, amounts to an averment that they had paid the money.

There was no error in rejecting the copy of Murray's deposition, for it was not taken in the cause. The plaintiff had no opportunity to cross-examine him. It was entirely an *ex parte* proceeding.

There could be no error in the direction given by the court to the jury, to find their damages in the alternative, or conditional manner; it is often done, when a question of law is to be saved. It is a kind of special verdict. The error, if any, must have been in rendering the judgment for the largest sum.

*The correctness of this judgment depends upon the question *215] whether it was competent for the jury, upon either of the issues, to hear parol evidence of the value. The policy was sealed, and subject to all the incidents of a sealed instrument at common law. The value agreed upon by the parties, under seal, cannot be denied by parol evidence. 4 Bac. 106; 1 Salk. 276; *Lewis v. Rucker*, 2 Burr. 1171; *Lawe v. Peers*, 4 Ibid. 2228.

But even if it were a policy without seal, the agreed value in the policy would be conclusive. Park 104, 267, 1167. The agreed value is conclusive, unless it appears to be a cover for a wager. An inquiry of the actual value is never made upon a valued policy, but with a view to ascertain whether it be a wager policy. There is not an instance in the English books, of the agreed value ever being reduced to a smaller sum. Upon a total loss, the agreed value is to be recovered, or nothing. If this be not the case, and you can go into the question of the actual value, every policy is reduced to an open policy.

Suppose, a man should make a bad bargain, and purchase a vessel for \$10,000, not worth \$5000. He insures, and it is agreed that the vessel shall be valued at \$10,000. A total loss happens; shall he be obliged to receive only the value of the vessel, to be ascertained by a jury. This is like every other case of liquidated damages; it is conclusive between the parties.

As to plea of fraud, it was too vague. The precedent cited from Wentworth is against them; the vessel, in that case, was stated to have been fraudulently consumed by fire. The case from Dallas is not relevant. The case of *Pollard v. Dwight* is against them. The court there refused to direct the amendment to be made. The case from 1 Wash. 313, was upon *216] a special demurrer, and it was most clear, that the *justice of the case required the amendment. It was a case clearly within the equity of the statute of *jeofails*. In the case from 7 T. R. 703, the court did give leave to amend, under the statute of *jeofails*, but it was in the exercise of its discretion.

E. J. Lee, in reply.—Amendments may be made at any time, even after verdict, and for that purpose, a new trial will be granted. *Tomlinson v.*

Marine Insurance Co. v. Hodgson.

Blacksmith, 7 T. R. 132 ; Str. 1151, 1162 ; Comb. 4 ; *Jude v. Syme*, 3 Call 522 ; 2 Salk. 622.

If the facts in the 9th plea would have vacated a policy, not under seal, the court ought to have suffered them to be pleaded to a sealed instrument, especially, after the 6th plea (which had been formerly adjudged good by the court below) had been rejected by this court. By that rejection, the defendants were entirely shut out from the benefit of these facts, upon the trial.

The misrepresentation was material to the risks of the voyage, and every such misrepresentation, whether fraudulently or innocently made, destroys the policy. Marshall 335. Fraud vitiates every contract, and may be examined into by a court of law. It has been decided, that courts of equity have no jurisdiction of insurance cases. *De Gheton v. London Assurance Company*, 3 Bro. P. C. 525. The contract of insurance is founded upon the principles of equity, and governed in all its parts by plain justice and good faith.

In a court of law, a defendant may show that the consideration of a bond is bad. *Collins v. Blantern*, 2 Wils. 347 ; *Guichard v. Roberts*, 1 W. Bl. 445 ; 4 Dall. 269 ; Jenk. 254. pl. 45 ; 1 Burr. 396 ; *Winch v. Keely*, 1 T. R. 619. In covenant, the plaintiff can recover only such damages as he has actually sustained, and the defendant may *give in evidence anything which [*217 shows that no damage has been sustained by reason of the breach of any covenant which the defendants were bound to perform. Evidence of fraud and misrepresentation went to show that the defendants were not bound to perform any of the covenants, and therefore, the plaintiff was not entitled to damages. 2 Selwyn 464.

March 17th, 1810. LIVINGSTON, J., delivered the opinion of the court, as follows :—This is an action of covenant, on a policy of insurance, to which the defendants pleaded : 1. That they had performed all things which, by the policy, they were bound to perform : 2. That the vessel insured was not captured and condemned, as in the declaration is mentioned : and 3. That the vessel insured was not seaworthy : on which pleas, issues were taken by the plaintiff.

There were, also, five special pleas, to which there were demurrers, all of which were allowed by the circuit court, except the one to the sixth plea, which, on a writ of error to this court, heretofore brought, was allowed here, and the cause then remanded to the circuit court for further proceedings to be had therein. On the return of the cause to the circuit court, the defendants moved for leave to file two additional pleas ; which motion was denied ; and is now relied on, as one of the errors for which the present judgment should be reversed.

This court does not think, that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the superior court *can never become fully possessed, that there would be more danger [*218 of injury, in revising matters of this kind, than what might result, now and then, from an arbitrary or improper exercise of this discretion. It may

Marine Insurance Co. v. Hodgson.

be very hard, not to grant a new trial, or not to continue a cause, but in neither case, can the party be relieved by a writ of error: nor is the court apprised, that a refusal to amend or to add a plea was ever made the subject of complaint in this way. The court, therefore, does not feel itself obliged to give any opinion on the conduct of the inferior court, in refusing to receive these pleas. At the same time, it has no difficulty in saying that, even in that stage of the proceedings, the circuit court might, if it had thought proper, have received these additional pleas, or admitted of any amendment in those already filed.

The court below having refused to receive these pleas, the trial proceeded on the three on which issues were joined; and the defendants offered, under them, or some of them, to prove that it was one of the rules of their office, that every order for insurance shall contain as full a description as can be given of the age, tonnage and equipment of the vessel; and that it was always their practice, to make no insurance on a vessel beyond her reasonable value, according to the representation given of her age, tonnage and equipment; and that such rule was known to the plaintiff; and that, to induce them to insure \$8000 on the brig Hope, the plaintiff represented her as a stout, well-built vessel of about 250 tons burden, and from six to seven years old, and that she was worth \$10,000; in consequence of which, they insured her for \$8000; that, on the contrary, she was not a well-built vessel of 250 tons burden, and was not from six to seven years old, but was more than eight and a half years old, and had been ill built; and that this difference between her true and her represented build, age and tonnage, was material to the risks of the voyage insured. This evidence, being objected to, was deemed inadmissible; and this court is now called on to say whether, in this opinion, there was any error.

*219] *However desirable it may be, to admit in evidence, on the general issue, in an action of covenant on a policy of insurance, everything which may avoid the contract, or lessen the damages, as is done in actions on the case, this court does not know that it possesses the power of changing the law of pleading, or to admit of evidence inconsistent with the forms which it has prescribed. No rule on this subject is more inflexible, than that, in actions on deeds, all special matters of defence must be pleaded. Of this rule, it is very certain, from a mere inspection of the record, that the defendants cannot allege ignorance. If everything, then, which is relied on to avoid a contract under seal, must be pleaded, it will, at once, be conceded, that none of the matters offered in evidence applied to either of the pleas. The defendants could not thus set up an excuse for not doing that which, by one of the pleas, they professed to have done; and as to the other pleas, which denied the capture and seaworthiness of the vessel, it will not be pretended, that any of this matter supported either of them. The same remarks apply to the second and third bills of exception. Neither fraud nor misrepresentation, as to the value of the vessel, or her age or tonnage, could be received in evidence, under either of these issues, no more than infancy or coverture, on a plea of *non est factum*; for, most certainly, none of the matters here offered by the defendants, the rejection of which occasioned these exceptions, went, in any degree, to prove either of the pleas on which issue had been joined.

The fourth exception is to the refusal of the court to admit the deposi-

Marine Insurance Co. v. Hodgson.

tion of William Murray, which appeared among the admiralty proceedings, and which was offered by the defendants, to prove that the vessel was not in the due course of her voyage, when she was captured, and the condition she was in, at the time of capture. As the defendants have not, in either of their pleas, relied on a deviation, it may be doubted, whether any evidence of that fact were admissible; but if it were proper, for the purpose of discrediting any testimony which had been offered by the plaintiff, to show where the Hope had been taken, it is not thought that *the circuit court erred in instructing the jury that the deposition of Murray [*220 was not competent evidence to prove that fact. If all the proceedings in the admiralty had been read by the plaintiff, without any previous agreement, on the part of the defendants, to save every objection to their contents, excepting the matter of authentication, the court will not say, that the defendants might not have insisted on using any deposition, among the papers, which made in their favor: but as the plaintiff could have read them for no other purpose than to prove the libel and condemnation, and must have attempted to prove no other fact by them, for which purpose it is expressly stated that they were offered, and as the defendants had, by their agreement, explicitly reserved to themselves every objection to their contents, it does not appear reasonable to permit them to select a deposition, as evidence for them, while the plaintiff could not have made use of that, or any other, if ever so favorable to himself. The circuit court, therefore, did not err in the instruction which it gave to the jury on this subject. This court cannot forbear remarking here, that it can never be necessary, in order to prove a condemnation, to produce anything more than the libel and sentence; although it is a frequent but useless practice to read the proceedings at length.

The fifth exception is taken to a refusal of the circuit court to direct the jury to find damages for the value of the vessel, as agreed in the policy, and, conditionally, for her actual value, if, in the opinion of the court, it was competent for the jury, under any of the issues joined, to inquire into the real value of the vessel. As it had already been decided, and as this court thinks, correctly, to receive no evidence of the real value of the vessel, there was no error in refusing to give this direction: and although the plaintiff, at length, consented to permit the defendants to give evidence of the real value of the vessel, saving objections to the competency of such evidence, upon any of the issues of fact, and the jury, thereupon, found conditional damages, this court is of opinion, that, as evidence of the real value of the vessel, under any of these issues, was incompetent, and as objections to its competency *were saved to the plaintiff, the circuit [*221 court did right in giving judgment for the damages found by the jury, according to the value of the vessel, fixed in the policy; which judgment this court affirms, with costs.

Judgment affirmed.¹

¹ The insurance company subsequently brought a suit in equity to enjoin the judgment, on the ground of the over-valuation, but failed. 7 Cr. 832.

SLACUM v. POMERY.

Damages on protested bill.—Action against indorser.—Error.

In an action by the indorsee against the indorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was indorsed.¹

The indorsement is a new and substantive contract.

In an action of debt against the indorser of a bill of exchange, under the statute of Virginia, it is necessary that the declaration should aver notice of the protest for non-payment.

It is not too late to allege, as error, in the appellate court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below.²

Pomery v. Slacum, 1 Cr. C. C. 578, reversed.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of debt (under the law of Virginia), brought by Pomery against Slacum, as indorser of a bill of exchange, dated the 6th of August 1807, drawn in the island of Barbadoes, by Charles Cadogan, a merchant residing there, at 60 days' sight, upon Barton, Irlam & Higginson, at Liverpool, in England, for 138*l.* 17*s.* 9*d.* sterling, payable to Slacum, or order, who indorsed it, at Alexandria, in the district of Columbia, to the plaintiff.

The declaration was, "of a plea that he render unto him 138*l.* 17*s.* 9*d.*, sterling money of Great Britain, with interest at the rate of five per centum per annum, from the 23d day of December 1807, until paid, together with fifteen per cent. damages on the said 138*l.* 17*s.* 9*d.* and 10*s.* 6*d.* sterling, of the value of \$2.33, current money of the United States, costs of protest, which to him he owes," &c.

It then stated the making and indorsing of the bill, the non-acceptance and non-payment, and the protest for non-payment, "by reason of which premises, and by force of the statute in that case made and provided, action hath accrued to the plaintiff to demand and have of the defendant the said sum of 138*l.* 17*s.* 9*d.* sterling, and interest at the rate of five per cent. per annum, from the 23d of December 1807, until paid, *together with fifteen per cent. damages, and 10*s.* 6*d.* sterling, of the value," &c.

Upon the trial of the cause, on the issue of *nil debet*, the defendant below took a bill of exception, stating that evidence was offered of the bill, the indorsement by the defendant to the plaintiff, in Alexandria (both parties being inhabitants of that town), the protest for non-payment, and that, by the laws of Barbadoes, the damages, upon protested bills of exchange, were only ten per cent. upon the principal and interest due upon the bill. Whereupon, the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover more than the damages allowed upon protested bills, according to the law of Barbadoes, and that he was not entitled in this case to fifteen per cent. damages, which instruction the court refused to give.

The verdict and judgment being for the plaintiff, for the whole amount demanded in the declaration, the defendant brought his writ of error.

The act of assembly of Virginia (P. P. 118) provides, "that where any bill of exchange is or shall be drawn, for the payment of any sum of money, in which the value is or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the drawer or indorser shall be subject to fifteen per centum damages thereon, and the bill shall

¹ *Lenox v. Wilson*, 1 Cr. C. C. 170.

² *Woodward v. Brown*, 18 Pet. 5; *Maher v. Ashmead*, 80 Penn. St. 344.

Slacum v. Pomery.

carry an interest of five per centum per annum, from the date of protest, until the money therein drawn for shall be fully satisfied and paid." "And that it shall be lawful for any person or persons having a right to demand any sum of money, upon a protested bill of exchange, to commence and prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers or indorsers jointly, or against either of them separately ; and judgment shall and may be given for such principal, damages and charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, and for interest upon the said principal money recovered, after the rate *of five per centum per annum, until the same [*223 shall be fully satisfied.

Swann, for the plaintiff in error, contended : 1. That the damages must be according to the law of the place where the bill was drawn. 2. That it was not averred in the declaration, that the defendant had notice of the protest for non-payment. And although this might have been taken advantage of in the court below, in arrest of judgment, yet it was also a fatal objection upon a writ of error. The record does not show that the plaintiff was entitled to his judgment. 2 Doug. 679.

Youngs, contrà.—This is not an action upon the custom of merchants, but upon the statute of Virginia.

MARSHALL, Ch. J.—It has never been doubted, in Virginia, that notice is as necessary, in an action upon the statute, as upon the custom of merchants.

Youngs.—There was no motion in arrest of judgment. This objection was not taken in the court below.

MARSHALL, Ch. J.—There can be no doubt, that anything appearing upon the record, which would have been fatal upon a motion in arrest of judgment, is equally fatal upon a writ of error.

Youngs.—This court, in the case of *Mandeville v. Riddle*, 1 Cranch 290, decided, that an action by a holder of a promissory note against an indorser, is only by reason of the value received, and yet in the case of *Wilson v. Codman*, 3 Cranch 193, 208, this court decided, that the averment of value received was an immaterial averment, and need not be proved. In our case, if notice were necessary to entitle the *plaintiff to a verdict, it will [*224 be presumed, after verdict, that notice was proved.

The statute upon which this action is founded does not require notice. The declaration avers all that the statute requires to constitute a cause of action. The want of notice is only to be taken advantage of by the defendant, in his defence at the trial. The time of bringing this action shows that reasonable notice was given. This court has decided, that it is not necessary to give notice of a protest for non-acceptance.

As to the question of damages. The law of the place where the contract was made must prevail. The contract of the defendant as indorser, was made in Alexandria. Every indorsement creates a new contract, and is in the nature of a new bill.

March 5th, 1810. **MARSHALL**, Ch. J., delivered the opinion of the court, as follows, viz :—Upon a critical examination of the act of assembly on which

Slacum v. Pomery.

this action is founded, the court is of opinion that it is rightly brought. Although the drawer of the bill was not liable to the damages of Virginia, the indorser is subject to them, he having indorsed the bill in Alexandria.

The words of the act are, that where a bill of exchange shall be protested, "the drawer or indorser shall be subject to fifteen per cent. damages thereon." The third section gives an action of debt "against the drawers or indorsers jointly, or against either of them separately. The act of assembly appears to contemplate a distinct liability in the indorser, founded on the contract created by his own indorsement, which is not affected by the extent of the liability of the drawer. This is the more reasonable, as a bill of exchange is taken as much on the credit of the indorser, as of the drawer ; and the indorsement is understood to be, not simply the transfer of the paper, but a new and a substantive contract.

*²²⁵ There is, however, an objection taken to this declaration. It omits to allege notice of the protest ; an omission which is deemed fatal. It has been argued, that the act of assembly which gives the action of debt, not requiring notice to be laid in the declaration, that requisite, which is only essential in an action founded on the custom of merchants, is totally dispensed with. But this court is not of that opinion. In giving the action of debt to the holder of a bill of exchange, and in giving it the dignity of a specialty, the legislature has not altered the character of the paper in other respects. It is still a pure commercial transaction, governed by commercial law. Notice of the protest is still necessary, and the omission to aver it in the declaration, is still fatal.

Had this error been moved in arrest of judgment, it is presumable, the judgment would have been arrested ; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below. The judgment is reversed, and the cause remanded, with direction that the judgment be arrested.

After the opinion was delivered, *Youngs* prayed that the cause might be remanded with leave to amend.

MARSHALL, Ch. J.—Here is a verdict, which must be set aside, before an amendment can be allowed. It might be set aside by the court below, but this court can see no reason in the record for setting it aside.

*VASSE v. SMITH.

Defence of infancy.—Bill of exceptions.

Infancy is a bar to an action by an owner against his supercargo, for breach of instructions; but not to an action of trover for the goods. Still, however, infancy may be given in evidence, in an action of trover, upon the plea of not guilty; not as a bar, but to show the nature of the act which is supposed to be a conversion.

An infant is liable in trover, although the goods were delivered to him under a contract, and although they were not actually converted to his own use.

A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed.¹

ERROR to the Circuit Court for the district of Columbia. The declaration had two counts; first, a special count, charging the defendant Smith, who was a supercargo, with breach of orders; second, trover.

The first point stated that Vasse, the plaintiff, was owner and possessed of seventy barrels of flour, and, at the instance and request of the defendant, put it on board a schooner, at Alexandria, to be shipped to Norfolk, under the care, management and direction of the defendant, to be by him sold for and on account of the plaintiff, at Norfolk, for cash, or on a credit at sixty days, in good drafts on Alexandria, and negotiable in the bank of Alexandria. That the defendant was retained and employed by the plaintiff for the purpose of selling the flour as aforesaid, for which service the plaintiff was to pay him a reasonable compensation. That the defendant received the flour at Alexandria, put it on board the schooner, and sailed, with the flour under his care and direction, to Norfolk; "yet the defendant, not regarding the duty of his said employment, so badly, carelessly, negligently and improvidently behaved himself in said service and employment, and took such little care of the said flour by him so received as aforesaid, that he did not sell the same, or any part thereof, at Norfolk, for cash, or on a credit of sixty days, for drafts on Alexandria, negotiable in the bank of Alexandria, but the said defendant, on the contrary thereof, by and through his own neglect and default, and through his wrongful conduct, carelessness and improvidence, suffered the same, and every part of the said seventy barrels of flour, in his possession as aforesaid, to be embezzled, or otherwise to be wholly lost, wasted and destroyed." *The second count was a [*227 common count in trover for the flour.

The defendant, besides the plea of not guilty, pleaded infancy to both counts; to which last plea, the plaintiff demurred generally. The court below rendered judgment for the defendant, upon the demurrer to the plea of infancy to the first count; and for the plaintiff, upon the demurrer to that plea to the second count.

Upon the trial, in the court below, of the issue of not guilty, to the count for trover, three bills of exception were taken by the plaintiff. The first bill of exception stated, that the defendant offered evidence to prove that the flour was consigned and delivered to the defendant by the plaintiff under the following letter of instructions:

¹ Insurance Co. v. Baring, 20 Wall. 162.

Vasse v. Smith.

"Mr. Samuel Smith,

Sir : I have shipped on board the schooner Sisters, Captain —, bound to Norfolk, 70 barrels of superfine flour, marked A. V., to you consigned. As soon as you arrive there, I will be obliged to you to dispose of it, as soon as you can, to the best advantage, for cash, or credit at 60 days in a good draft on this place, negotiable at the bank of Alexandria. I should prefer the first, if not much difference ; however, do for the best of my interest.

(Signed) AMB. VASSE."

And that the defendant received the flour in consequence of that letter of instructions, and upon the terms therein mentioned. That the flour was not sold by the defendant at Norfolk, but was shipped from thence by him, without other authority than the said letter of instructions, to the West Indies, for and on account of one Joseph Smith, as stated in the bill of lading, which was for 398 barrels, 70 of which were stated in the margin to be marked A. V.; 198, I. S.; 100, D. I. S.; and 30, P. T.

*That the defendant, when he received the flour, and long after he [228] shipped it, was an infant, under the age of twenty-one years. Whereupon the court, at the prayer of the defendant, instructed the jury, that if they found the facts as stated, the defendant was not liable upon the count for trover. The second exception was the admission of evidence of the defendant's infancy.

The third exception stated that, "upon the facts aforesaid (the facts in the first bill of exceptions mentioned), the plaintiff prayed the court to instruct the jury, that if they shall be of opinion, that the defendant was under the age of twenty-one years, and between the age of nineteen and twenty years, and that the defendant, of his own head, shipped the flour to the West Indies, in a vessel which has been lost by the perils of the sea, and that the said shipment was made with other flour, on account of his father, Joseph Smith, in such case, the defendant has thereby committed a tort in regard to the plaintiff, for which he is liable in this action, notwithstanding his infancy aforesaid ; which instruction the court refused to give.

The verdict and judgment being against the plaintiff, he brought his writ of error.

E. J. Lee and C. Lee, for the plaintiff in error.—

1. The infancy of the defendant was no bar to the first count, because it was a count in tort, and not upon contract, and infants are liable for torts and injuries of a private nature. *Govett v. Radnidge*, 3 East 62 ; 3 Bac. Abr. 132 ; Noy 129 ; *Fearnes v. Smith*, Roll. Abr. 530 ; 3 Bac. Abr. 126.

2. The shipping of the flour without authority was a conversion. *Youl v. Harbottle*, Peake's Cas. 49 ; *Syeds v. Hay*, 4 T. R. 260 ; *Perkins v. Smith*, 1 Wils. 328 ; Bull. N. P. 35 ; 6 Mod. 212 ; *McCombie v. Davies*, 6 East 539.

*3. Infancy cannot be given in evidence upon the issue of not guilty. It is admitted, that if the possession had been obtained by a tort, the infant would be liable ; but it is contended, that the possession having been rightfully obtained, a subsequent misapplication of the property, by an infant, cannot be a conversion, unless it be actually a conversion to his own use. But there are no cases to justify such a doctrine, and it is contrary to the principles of analogous cases. In an action of trespass for

Vasse v. Smith.

mesne profits, infancy is no bar, although he becomes a trespasser by implication of law. Latch 21; 1 Bac. Abr. 132; 1 Esp. 172. So, a *feme covert* is liable in an action of trover, because the conversion is a tort. Yelv. 166. Although infancy may be given in evidence upon *non assumpsit*, yet it cannot upon any other general issue. Gilb. L. Ev. 164, 216, 217; 2 T. R. 166. Upon not guilty, the defendant cannot give in evidence a license, nor a right to a way, nor any other matter of justification. 2 Str. 1200; 1 Tidd 591, 598, 600.

Any act which, if done by a person of full age, would be a conversion, will be a conversion if done by an infant. In the present case, the bill of lading, which is a negotiable instrument, being in the name of Joseph Smith, the plaintiff had no power or control over it. It would, unquestionably, be a conversion, if done by an adult. The only question is, whether the nature of the act is altered, by being done by an infant. 1 T. R. 215, 745; 2 Ibid. 63; 6 Ibid. 131; 5 Ibid. 583.

Swann, contrà.—An infant is liable for actual, not for constructive torts, founded upon contract or bailment, which is in the nature of a contract. In this case, the action might as well have been brought upon the contract, as upon *the tort. If it had been brought upon the contract, infancy [*230] would have been a bar. The case is clearly within the reason of the law of infancy, and it cannot be in the power of the plaintiff, by his form of action, to deprive the defendant of his defence. The case cited from Peake's Cases arose entirely *ex delicto*. There are cases in which infancy may be given in evidence upon not guilty. 5 Burr. 2826.

March 5th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—The first error, alleged in this record, consists in sustaining the plea of infancy to the first count in the declaration.

This count states a contract between the plaintiff and defendant, by which the plaintiff committed seventy barrels of flour to the care of the defendant, to be carried to Norfolk, and there sold for money, or on sixty days' credit, payable in drafts on Alexandria, negotiable in the bank. The plaintiff then alleges that the defendant did not perform his duty in selling conformable to his instructions, but, by his negligence, permitted the flour to be wasted so that it was lost to the plaintiff. This case, as stated, is completely a case of contract, and exhibits no feature of such a tort as will charge an infant. There can be no doubt, but that the court did right in sustaining the plea.

The second count is in trover, and charges a conversion of the flour. That an infant is liable for a conversion is not contested. The circuit court was itself of that opinion, and therefore, sustained the demurrer to this plea. But in the progress of the cause, it appeared, *that the goods [*231] were not taken wrongfully by the defendant, but were committed to his care, by the plaintiff, and that the conversion, if made, was made while they were in his custody under a contract. The court then permitted infancy to be given in evidence, on the plea of not guilty. To this opinion, an exception was taken.

If infancy was a bar to a suit of trover, brought in such a case, the court can perceive no reason why it may not be given in evidence on this plea. If it may be given in evidence on *non assumpsit*, because the infant can-

Vasse v. Smith.

not contract, with at least as equal reason, may it be given in evidence, in an action of trover, in a case in which he cannot convert.

But this court is of opinion, that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract.¹ The conversion is still in its nature a tort; it is not an act of omission, but of commission, and is within that class of offences for which infancy cannot afford protection. Yet it may be given in evidence, for it may have some influence on the question, whether the act complained of be really a conversion, or not. The court therefore, does not consider the admission of this testimony as error.

The defendant exhibited the letter of instructions under which he acted, which is in these words: "Sir," &c., but the plaintiff offered evidence that the flour was not sold in Norfolk, but was shipped by the defendant to the West Indies, for and on account of a certain Joseph Smith, as by the bill of lading which was produced. The defendant then gave his infancy in evidence, and prayed the court to instruct the jury, that if they believed the testimony, he was not liable on the second count stated in the plaintiff's declaration, which instruction the court gave, and to this opinion, an exception was taken.

This instruction of the court must have been founded on the opinion [232] that infancy is a bar to an action of *trover for goods committed to the infant, under a contract, or that the fact proved did not amount to a conversion. This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession. It remains to inquire, whether this is so clearly shown not to be a conversion, as to justify the court in saying to the jury, the defendant was not liable in this action.

The proof offered was, that the defendant shipped the goods on account of Joseph Smith. This fact, standing unconnected with any other, would unquestionably be testimony which, if not conclusive in favor of the plaintiff, was, at least, proper to be left to the jury. But it is urged, that this statement refers to the bill of lading, from the notes in the margin of which, it appears, that although the bill of lading, which was for a much larger quantity of flour, was made out in the name of Joseph Smith, yet, in point of fact, the shipment was made for various persons, and, among others, for the plaintiff.

The court perceive, in this bill of exceptions, no evidence explanatory of the terms under which this shipment was made, and the marks in the margin of the bill of lading do not, in themselves, prove that the shipment was not made for the person in whose name the bill was filled up.

It is possible, that it may have been proved to the jury, that this flour was really intended to be shipped on account of the plaintiff, and that the defendant did not mean to convert it to his own use. But the letter did not

¹ Whenever the substantive ground of an action against an infant is contract, though stated as inducement to a supposed tort, the plaintiff cannot recover. *Wilt v. Welsh*, 6 Watts 9; *Penrose v. Curren*, 3 Rawle 351; *Hewitt v. Warren*, 10 Hun 560. But he is liable for a pure tort. *Campbell v. Stokes*, 2 Wend. 187;

Fish v. Ferris, 5 Duer 49. As, if he fraudulently obtain goods upon credit, with an intent not to pay for them. *Wallace v. Morss*, 5 Hill 391. But he is not liable to an action for breach of promise of marriage. *Hunt v. Peake*, 5 Cow. 475; *Hamilton v. Lomax*, 26 Barb. 615.

Custiss v. Turnpike Co.

authorize him so to act. It was not, therefore, a complete discharge ; and should it be admitted, that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to the jury. The defendant would certainly be at liberty to prove, that the shipment was in fact made for Vasse, and that he acquiesced in it, so far as to consider the transaction not as a conversion ; but without any of *these circumstances which, if given in evidence, ought to have been left to [*233 the jury, the court has declared the action not sustainable.

This court is of opinion, that the circuit court has erred in directing the jury that, upon the evidence given, the defendant was not liable under the second count ; for which their judgment is to be reversed, and the cause remanded for further proceedings.(a)

CUSTISS v. GEORGETOWN AND ALEXANDRIA TURNPIKE COMPANY.

Appeal.—Inquisition of damages.

An appeal lies to the supreme court from an order of the circuit court of the district of Columbia, quashing an inquisition in the nature of a writ *ad quod damnum*.¹

The circuit court for the District of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's causey to Alexandria."

Georgetown Turnpike Road Co. v. Custis, 1 Cr. C. C. 585, reversed.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, which had quashed an inquisition taken by the marshal, condemning land of Mr. Custiss for a turnpike road.

The inquisition was taken under the 7th section of the act of congress of the 3d of March 1809, "to authorize the making of a turnpike road from Mason's causey to Alexandria" (2 U. S. Stat. 541), which provides, that it shall be lawful for the president and directors of the turnpike company to agree with the owners of any ground to be occupied by the road and the necessary toll-houses and gates, for the right thereof ; and in case of disagreement, "on application to one of the judges of the circuit court, he shall issue a warrant, directed to the marshal of the district, to summon a jury of twenty-four inhabitants of the district of Columbia, of property and reputation, not related to the parties, nor in any manner interested, to meet on the land to be valued, at a day to be expressed in the warrant, not less than ten nor more than twenty thereafter ; and the marshal, upon receiving the said warrant shall forthwith summon *the said jury, and when met, [*234 provided there be not less than twelve, shall administer an oath or affirmation to every juryman that shall appear, that he shall faithfully, justly and impartially value the lands, and all damages the owner thereof shall sustain, by opening the road through such land, according to the best of his skill and judgment ; and that the inquisition thereupon taken shall be

(a) The Chief Justice noticed also the phraseology of the third bill of exceptions. It prayed the opinion of the court upon certain facts, without stating that any evidence of those facts was given to the jury. It is doubtful, whether those facts exist in the case, and whether the court would be bound to give an opinion upon them.

¹ *S. P. Baltimore and Potomac Railroad Co. v. Church, 19 Wall. 62.*

Custiss v. Turnpike Co.

signed by the marshal and the jurymen present, and returned by the marshal to the clerk of the county, to be by him recorded; and upon every such valuation, the jury is hereby directed to describe and ascertain the bounds of the land by them valued, and their valuation shall be conclusive upon all persons; and shall be paid by the president and directors to the owner of the land, or his or her legal representatives; and on payment thereof, the said land shall be taken and occupied for a public road, and for the necessary toll-houses and gates for ever."

On the application of the president and directors of the company, a warrant was granted, and an inquisition taken and returned to the clerk. Before it was recorded, the president and directors obtained from the circuit court of the district of Columbia, sitting at Alexandria, a rule upon Mr. Custiss to show cause why the inquisition should not be quashed. Mr. Custiss appeared and objected to the jurisdiction of the court, but the court overruled the objection, and, upon hearing, quashed the inquest. From this order, Mr. Custiss appealed to this court.

E. J. Lee, for the appellant.—The circuit court had no jurisdiction of the case, upon motion. No such jurisdiction is given by the act of congress. It directs the marshal to return the inquisition to the office of the clerk, to be by him recorded. The remedy, if any exists, is by bill in equity. This was an application to the court, as a court of law. Even the court itself, in recording deeds, acts in a ministerial capacity. 2 Hen. & Munf. 132, 135; *Rex v. Justices of Derbyshire*, 1 W. Bl. 605; 6 T. R. 88.

*285] **F. S. Key*, and *C. Lee*, contrà.—The court must of necessity possess a power and control over its own record. Suppose, the clerk should refuse to record the inquisition; or suppose, he is about to record an irregular and informal inquisition, will not the court control him? Such a jurisdiction is exercised by the courts in England, without the authority of any statute. The case from Hening & Munsford only decides that the court could not inquire into the right of the party to make the deed, or to inquire into the title or contending claims. But the court must see whether it be a deed or not; whether it be proved by the proper number of witnesses, and whether it be sealed. The clerk of the court could not put anything upon record without the authority of the court.

This court cannot correct the error, if it be one. No writ of error will lie in such a case. This court can correct only error in law, and this, if it be an error, is an error in fact.

March 5th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—At the opening of this case, some doubt was entertained respecting the jurisdiction of the supreme court, but that doubt is removed by an inspection of the act by which the circuit court of the district of Columbia is constituted. The words of that act, descriptive of the appellate jurisdiction of this court, are more ample than those employed in the judicial act. They are, that "any final judgment, order or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of \$100, may be re-examined and reversed or affirmed in the supreme court."

Custiss v. Turnpike Co.

The jurisdiction of this court being admitted, the proceedings of the circuit court, in ordering the inquisition *taken between these parties to [*236 be quashed, comes on to be examined.

The first objection to this proceeding is, that the court of Alexandria could take no cognisance of the subject, by way of motion. The validity of this objection depends entirely on the act of congress, under which this inquisition was taken. If it was to be recorded, by order of the court, if the judgment of the court was, in any manner, to be exercised upon it, then, in all which has been done, the court has exercised its jurisdiction, and the inquiry will be, whether there was sufficient cause for refusing to permit the inquisition to be recorded. If, on the other hand, the clerk was a mere ministerial officer, directed by law to perform a ministerial act, without any superintending agency on the part of the court, then, the court could not, upon motion, prohibit the clerk to perform his duty, and could not legitimately quash the inquisition.

The act of congress directs "that the inquisition, when taken, shall be signed by the marshal and by the jurymen present, and returned by the marshal to the clerk of the county, to be by him recorded." That the legislature may direct the clerk of a court to perform a specified service, without making his act the act of the court, will not be controverted: and if this may be done, it is difficult to conceive words which convey this idea more clearly than those which are employed in this act. The inquisition is not returnable to the court, but to the clerk. It is not to be recorded, by order of the court, but is to be recorded by the clerk, on receiving it from the marshal. It does not derive its validity from being recorded, but remains afterwards liable to all the objections which might be taken to it, previous thereto. If, for example, an inquisition should be recorded which was found by eleven jurors, that inquisition would neither vest the land in the company, nor give a right to *the former proprietor to demand the [*237 money to which it was valued. The inquisition, then, is to be recorded solely for preservation, and the act of recording is a ministerial act, which the law directs the clerk to perform, without submitting the paper to the judgment of the court. The law asks not the intervention of the court, and requires no exercise of judicial functions.

The difference between this act and those, the execution of which is superintended by the court, is apparent. In those cases, the instrument is to be brought into court, and acted upon by the court: in this, it is to be delivered to the clerk, at any time, and acted on by him, without the intervention of the court.

This court is unanimously of opinion, that the circuit court for the county of Alexandria could not legally entertain the motion for quashing the inquisition found in this case, nor legally prevent their clerk from recording it. Their judgment, therefore, is reversed, and the motion to be dismissed.

Judgment reversed.¹

¹ For a further decision between these parties, in an action of debt, founded on the inquisition of damages, see 2 Cr. C. C. 81.

LODGE's Lessee v. LEE.

Grant of island.

A grant of an island by name, in the Potomac river, superadding the courses and distances of the lines thereof, which, on re-survey, are now found to exclude part of the island, will pass the whole island.

EJECTMENT, by Lodge against Lee, for part of an island in the Potomac river, called Eden, but now generally called Lee's island.

The plaintiff's lessor had taken up the land, in the year 1804, as vacant, supposing that the defendant's claim must be bounded by the course and distance, allowing one degree of variation for every twenty years since the certificate of survey was made, under which the defendant claims.

The defendant claimed under a patent from the lord proprietor of Maryland, dated in 1723, which granted to Thomas Lee, "all that tract or upper *238] island of land, called Eden, lying and being in Prince George county, beginning at a bounded maple, near ten miles above the second falls, and opposite to a large run on the Virginia side, called Hickory run, and standing upon a point at the foot of the said island, and running thence north sixty degrees, west sixty perches," &c. (giving the course and distance of every line to the beginning tree), "containing and laid out for 320 acres of land, more or less."

THE COURT below instructed the jury, that the grant to Thomas Lee passed the whole of the land called Eden, and that the lessor of the plaintiff is not entitled to recover. Verdict and judgment for plaintiff; which opinion and judgment were, by this court, without argument, affirmed.

Judgment affirmed.

FINLEY v. LYNN.*Relief in equity.—Reformation.*

A bond, executed in pursuance of articles of agreement, may, in equity, be reformed by those articles.¹

A complainant in equity may have relief, even against the admissions in his bill.

If the members of a firm agree among themselves, that the firm shall pay an individual partner's debt, it becomes an equitable claim against the firm assets.

ERROR to the Circuit Court for the district of Columbia, in a suit in chancery, brought by Finley against Lynn.

The bill stated, that on the 27th of February 1804, the plaintiff and defendant entered into articles of copartnership, by which the stock to be furnished by the plaintiff was to consist of one-half of the ship United States, and \$5000; and by the defendant, his gold and silver manufactory, two lots in the city of Washington, all his stock of merchandise, and the rents of two

¹ So, a policy of insurance will be reformed, by the written order for insurance. *Norris v. Insurance Co. of North America*, 8 Yeates 84. Whenever an instrument is drawn and executed, which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which, by mistake, violates

or fails to fulfil the manifest intention of the parties, equity, if the proof is clear, will correct the mistake, so as to produce a conformity of the written instrument to the antecedent agreement of the parties. *Ivinson v. Hutton*, 98 U. S. 79, 83, per CLIFFORD, J.

Finley v. Lynn.

houses. That a part of the merchandise agreed to be furnished consisted of plate, jewelry, &c., purchased by the defendant of Messrs. Lemuel Wells & Co., to the amount, as was then supposed, of \$2300 ; and in consideration of its being brought into the joint stock, the plaintiff agreed to pay one-half of the debt due to Wells & Co. therefor.

That the business of the concern was conducted in two separate stores, viz., a hardware store, principally *under the management of the plaintiff ; and a jewelry store, under the management of the defendant, containing the stock of jewelry, &c., brought into the joint concern by the defendant, and that which was purchased of Wells & Co. The business of the copartnership was carried on until the 1st of March 1805, when a dissolution took place. During that period, goods were bought and carried into the jewelry store, and at the time of the dissolution "the jewelry store was indebted to said concern" in the sum of \$2825.27, besides which, the concern had paid Wells & Co., in part of their debt, the sum of \$263.56. That the dissolution was upon the following terms, viz., that the defendant should withdraw all the property put into the joint stock by him ; and should have the the goods in the jewelry store, and all the debts due to that store, as a compensation and in lieu of the profits arising upon the whole business. And the plaintiff was to take on his account the goods in the hardware store, and the goods which were ordered for the spring ; and was to indemnify the defendant from from all claims or demands upon the concern, or which might arise from goods then ordered, and not at that time received ; which articles of dissolution were under seal. That when the plaintiff signed the articles of dissolution, he did not intend to commit himself to the payment of the debt due to Wells & Co. For although, by the articles of copartnership, he had agreed to pay half the debt, yet as the goods were given up to the defendant upon the dissolution, he considered himself absolved from that obligation. And the plaintiff contended that the defendant ought to have been satisfied, when the plaintiff " returned to him the whole jewelry store, with the accession of nearly \$3000 worth of merchandise, and gave up to him the profits of the said store, which he believed to be equal to \$2500 more."

That upon the dissolution, the plaintiff agreed to give the defendant security for his performance of the terms of the dissolution, and the defendant had a bond prepared, which was signed by the plaintiff and his sureties ; that the plaintiff did not see the bond, until he was called *on [*240 to sign it, and that he was satisfied he never read it, taking it for granted that it was a bond to compel him to perform what he was bound to perform by the terms of the dissolution ; and that his sureties executed it, under the same circumstances and impression. That the defendant did not claim payment of the debt due to Wells & Co., for a year after the bond was executed, although Wells & Co., before the dissolution, had brought suit against the defendant therefor ; that the defendant had rendered the plaintiff some accounts in which that debt was not mentioned. That the defendant afterwards brought suit upon the plaintiff's bond, and gave notice that he should claim the whole amount of the debt due to Wells & Co. That the plaintiff's counsel was of opinion, that the bond was so worded as to bind the plaintiff to the payment of that debt, whereupon, the plaintiff confessed a judgment at law, saving his right to relief in equity.

Finley v. Lynn.

That the bond was executed under a mistaken impression of its contents ; and that the defendant will take out execution upon the judgment at law. The bill then prayed an injunction to stay execution, until the matter in dispute could be heard and decided in equity, and the accounts between the plaintiff and defendant examined and settled, and for general relief. The injunction was granted by one of the judges, out of court.

In the articles of copartnership, after stating what stock the plaintiff should bring into the joint concern, the debt to Wells & Co. was mentioned in the following manner, viz. " And on the part of Adam Lynn, his gold and silver manufactory, two lots in the city of Washington, all his stock of merchandise (the said O. P. Finley and Adam Lynn, jointly and severally, by these presents, binding themselves, their heirs, executors, administrators and assigns, to pay to Lemuel Wells & Co., of New York, \$2300, money due to them on account of said merchandise), the rents of one house," &c.

*241] The account against the jewelry store was an account *opened in the books of the company, charging that store with goods purchased and put into it for sale on the joint account ; and giving it credit by cash and by goods sold to sundry persons ; showing a balance of goods remaining in that store of \$2825.27½, over and above the goods which were in it at the commencement of the copartnership. The articles of dissolution were truly recited in the bill.

The condition of the bond of indemnity was as follows : " Whereas, the said O. P. Finley and Adam Lynn, late joint merchants and copartners under the firm of Finley & Lynn, have, by mutual consent, dissolved the said copartnership, on the first day of the present month, on which dissolution, it was, among other things, agreed between the said Oliver P. Finley and the said Adam Lynn, that the said Oliver P. Finley should satisfy and pay all debts and contracts due from or entered into by the said copartnership, or either of the said copartners, for or on account of, or for the benefit of the said copartnership, including certain debts due from the said Adam Lynn, for goods by him ordered, which have been received by the said copartnership ; and also all debts which may arise from merchandise hereafter shipped to the said concern in consequence of any orders heretofore made : Now, the condition of the above obligation is such, that if the said Oliver P. Finley shall well and truly satisfy and discharge all the debts and contracts herein before described, so as to indemnify and save harmless the said Adam Lynn from the payment of the same, and from any suit or prosecution in law or equity, for or on account of the said debts and contracts, then this obligation to be void."

There was also raised in the books of the concern an account against "merchandise," the balance to the debit of which was \$4028.89. And a statement of hardware imported on the joint account, before March 1805, *242] amounting to \$7653.08. *And of debts of the concern, paid by Finley, amounting to about \$6000.

The defendant's answer admitted the original articles of copartnership and of dissolution, and the bond, as referred to in the bill. It denied, that the plaintiff advanced the \$5000 in cash ; and averred, that the profits of the ship United States never came to the use of the concern, but were retained by Ricketts & Newton, to whom the plaintiff had transferred his half of that

Finley v. Lynn.

ship. It averred, that by the articles of copartnership, each party was to bring into the joint stock \$11,000. That the defendant brought in \$2429 more than his proportion, which was the reason of making the debt to Wells & Co. a partnership debt; after which there was still an excess of capital, amounting to \$129, furnished by the defendant, for which he had credit upon the first opening of the partnership books.

The entry of stock on the 1st of March 1804, was as follows:

	£	s.	d.	
Cash in England,	1500	0	0	
One half ship U. States,	1800	0	0	
Real estate,	1290	0	0	
Manufactury,	1200	0	0	
Merchandise,	1538	14	0	£ s. d.
				<hr/> 7328 14 0
Due from stock to L. Wells & Co., of N. Y.				690 0 0
To Adam Lynn,				38 14 0

It averred, that the debt to Wells & Co. was, from this period, always considered by both parties as a copartnership debt, and that it was by the advice of the plaintiff, that the defendant suffered himself to be sued for that debt.

It admitted, that some goods were brought from the hardware store to the jewelry store, but averred, goods to a large amount were also taken from the latter to *the former store, of which no account was kept. It denied, that the account exhibited by the plaintiff against the jewelry store was correct; and averred, that if a true account had been kept, the balance would have been in favor of that store. It averred, that it was the intention of the defendant, and he believed of the plaintiff also, in the articles of dissolution, to include the debt due to Wells & Co., under the description of "all claims and demands on the concern." That it was adopted as a social debt, by the articles of copartnership, and was placed to the credit of Wells & Co., on the books of the concern, and a partial payment made out of the joint funds. That if this credit had not been so given, the defendant would have been a creditor of the concern to the amount of \$2429 instead of \$129. That the plaintiff had paid many of the debts due from the jewelry store, which were situated exactly like that of Wells & Co.

The answer expressly averred, that the plaintiff did read, examine and, as the defendant believed, perfectly understand the bond of indemnity, before he executed it. That it was left with him some hours, before he signed it. And it averred also, positively, that the plaintiff's sureties read it, and made remarks to the defendant, in the presence of the plaintiff, upon the manner in which it was drawn.

It stated, that the defendant offered the plaintiff two propositions as the basis of the dissolution. One was, that a dividend should be made of the debts, the profits and the stock; and if any difference should arise, on settlement, it should be submitted to three merchants. The other was, that the defendant should have the merchandise in the jewelry store, and the debts due to that store, as a compensation in lieu of the profits of the whole business; that the plaintiff should hold the merchandise in the hardware

Finley v. Lynn.

store, and the debts due to it, and the profits of the trade, and should pay all debts and contracts as stated in the bond ; the latter of which propositions was accepted by the plaintiff.

*244] *The answer denied, that the defendant received back the jewelry store, with the accession of \$3000 worth of merchandise, or that the profits were equal to \$2500. It averred, that the defendant believed they did not exceed \$1250, and were less than those of the hardware store. That the profits of the ship United States were at least \$4000. These the defendant relinquished, to obtain indemnity against the debts of the concern. That the plaintiff refused to take an inventory, at the time of dissolution, so that an accurate account could not be taken. That the reason why he did not sooner claim from the plaintiff the amount due to Wells & Co. was, that he was under an erroneous opinion, that he could have no recourse to the plaintiff, until he should first have paid and discharged that debt. The answer denied any agreement between the plaintiff and defendant to acquit each other of their private debts.

The only testimony in the cause related to the profits of the ship United States ; and the accounts exhibited being true copies from the books.

The court below, conceiving that the whole equity of the bill was completely denied by the answer, and not supported by the evidence in the cause, dissolved the injunction ; and upon final hearing, dismissed the bill ; whereupon, the plaintiff brought his writ of error.

Swann and Youngs, for the plaintiff in error, contended : 1. That Finley was not bound to pay the debt due to Wells & Co. ; and 2. That Finley was entitled to the amount standing on the books of the concern to the debit of the jewelry store, it being (as they contended) a debt due to the hardware store, and that, by the true construction of the articles of dissolution, Finley was entitled to the debts due to that store.

*245] *1. In support of the first point, it was said, that by the articles of dissolution, Finley was bound to indemnify Lynn from "claims and demands upon the concern" only. That the claim of Wells & Co. was against Lynn only, for goods originally sold to him, upon his sole credit, and that although the goods afterwards came to the use of the concern, and although Finley and Lynn might agree between themselves to consider it as a joint debt, yet that would give Wells & Co. no claim upon the concern. That the bond was given merely to carry into effect the articles of dissolution, and will not in equity be extended beyond the expressions of those articles. The bond does not alter the equitable obligations of the parties. 1 Fonbl. 106, 188, 192 ; 2 Atk. 203 ; 2 P. Wms. 349 ; 1 Ibid. 123.

2. Although the articles of dissolution do not expressly give Finley the debts due to the hardware store, yet it is to be implied, from the principle of reciprocity which seems intended between the parties, and from the circumstance that he was bound to pay all the debts of the concern. 1 Fonbl. 427. Although the account makes the jewelry store debtor to Finley & Lynn, yet it means Finley & Lynn's hardware store, because that store was carried on in the name of Finley & Lynn, the jewelry store in the name of Lynn only.

Although the plaintiff has not in his bill claimed this balance, yet that is no objection to his recovery. He has prayed for general relief, and the

Finley v. Lynn.

court will give him everything which in equity he ought to have. 3 Atk. 523.

Although the defendant denies that balance to be due, because he says, goods, of which no account was taken, had been carried from the jewelry to the hardware store, yet he admits that the goods charged in the account were furnished and sent to the jewelry store, and his answer is no evidence that goods were carried from the jewelry to the hardware store. It is not an averment responsive to the bill, and must be proved by other evidence than the defendant's answer. *One witness will authorize a decree [*246 against an answer. 1 Atk. 19. And here was a witness who testified that both the parties admitted the entries in that account to be correct.

E. J. Lee and Jones, contrà.—The whole equity of the bill consists in the allegation that the bond does not agree with the articles of dissolution, and was obtained by surprise. It contains no other ground of complaint. The answer completely denies this equity, and there is no proof to support it.

The bond is warranted by the articles of dissolution and the articles of copartnership. The ground of surprise and mistake is denied absolutely by the answer. It is a rule in equity, that the ground of mistake or surprise must be clearly proved, before a court of equity will interfere. 1 Ves. 317. In this case, there is a total failure of proof altogether. Nothing can be clearer than the liability of the plaintiff to pay the debt of Wells & Co. The articles of copartnership are express and pointed to that effect. The articles of dissolution, taken in connection with the articles of copartnership, are equally explicit, and the bond is unequivocal.

With regard to the account raised against the jewelry store, it is no more than a memorandum of the amount of goods placed there for sale. The account is with the concern ; the plaintiff in his bill expressly states it to be so. It is no more than if the company had chosen to keep a separate account of the profits arising from any particular article of merchandise. It is very common for merchants to open an account against flour, or rum, or tobacco, or wine, or any other article in which they have large dealings, yet no one ever thought that such an account created a debt. If this account against the jewelry store created a debt, it was Finley & Lynn's debt to Finley & Lynn. The jewelry store was Finley & Lynn's store. An account against the store was, therefore, an account *against Finley & Lynn. It was merely [*247 the right hand mad^a debtor to the left.

Besides, it was clearly the intention of the parties that something should be given to Lynn, in lieu of his share of the profits of the trade. If you give him the goods in the jewelry store, and still make him debtor for the goods, you give him nothing. He might as well have bought the goods elsewhere. The plaintiff in his bill makes a merit of having given up to the defendant the whole jewelry store, with the accession of nearly \$3000 worth of merchandise, and the whole profits of that store to the amount of \$2500. This could not possibly have been the case, if the defendant was to be made debtor for those goods. Although a person is not bound in equity by the admission of a principle of law, yet he is, by the admission of a fact ; and here is a clear admission of a fact as to the understanding and the intention of the parties, at the time of the dissolution.

March 7th, 1810. MARSHALL, Ch. J., delivered the opinion of the court,

Finley v. Lynn.

as follows, viz : (a)—The plaintiff and defendant had been copartners in trade, and had carried on their business in two stores; the one a jewelry store, in the name of Lynn, to be conducted exclusively by him; the other, a hardware store, in the name of Finley & Lynn, to be under the joint management of the partners.

Previous to the commencement of their partnership, Lynn had contracted a debt to Lemuel Wells & Co., of New York, for goods ordered for a jewelry store carried on by himself, which goods it was mutually agreed to transfer to the new concern, and the debt to Lemuel Wells & Co. should become a debt chargeable on the social fund.

In February 1805, it was agreed to dissolve the copartnership; and articles were entered into to take *effect on the first day of March. The [248] terms were, "that Adam Lynn shall withdraw all the property put into the joint stock by him, and that he shall have the goods in the jewelry store, and all the debts due to that store, as a compensation in lieu of the profits arising from the whole business; and the said Finley agrees to take, on his own account, the goods in the hardware store, and the goods which are ordered in the spring, and to indemnify the said Adam Lynn from all claims or demands upon the said concern, or which may arise for goods now ordered, and not yet arrived."

On the 2d of March, a bond of indemnity was executed, the condition of which, after stating the dissolution, proceeds thus: "On which dissolution, it was, among other things, agreed, that the said Oliver P. Finley should satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, or either of the said copartners, for or on account of or for the benefit of the said copartnership, including certain debts due from the said Adam Lynn for goods by him ordered, which have been received by the said copartnership, and also all debts which may arise from merchandise hereafter shipped to the said concern, in consequence of any orders heretofore made: Now, the condition of the above obligation is such, that if the said Oliver P. Finley shall well and truly satisfy and discharge all the debts and contracts herein before described, so as to indemnify and save harmless the said Adam Lynn from the payment of the same, and from any suit or prosecution in law or equity for or on account of the said debts and contracts, then this obligation to be void."

Some time previous to the dissolution, an action had been brought by Lemuel Wells & Co. against Adam Lynn, for the recovery of their debt, which was then depending.

In December 1806, Adam Lynn, for the first time, claimed, under the bond of indemnity, the amount of *the debt to Lemuel Wells & Co., [249] and payment being refused, instituted a suit on the bond. Supposing that no defence could be made at law, judgment was confessed, with a reservation of all equitable objections to the payment. A bill was then filed, suggesting that the bond was executed by mistake, and in the confidence that it was in exact conformity with the articles, and praying that it might be restrained by the articles. Several extrinsic circumstances are also detailed and relied upon, as demonstrating that Lynn himself did not suppose, until so informed by counsel, that the bond comprehended this debt.

(a) Judge JOHNSON was absent.

Finley v. Lynn.

An injunction was granted, which, on the coming in of the answer, was dissolved, and on a final hearing, the bill was dismissed.

The answer denies all the allegations of the bill which go to the mistake under which the bond was executed ; insists that it conforms to the true meaning of the articles and intent of the parties ; and endeavors to explain those extrinsic circumstances on which the plaintiff relied.

That a bond, executed in pursuance of articles, may be restrained by those articles, if the departure from them be clearly shown, is not to be controverted. But in this case, the majority of the court is of opinion, that no such departure is manifested with sufficient clearness, to justify the interposition of a court of equity.

By the articles of copartnership, the debt to Lemuel Wells & Co. was assumed by the firm of Finley & Lynn, and was payable out of the partnership fund. It is true, that, at law, it did not constitute a demand against the partnership, but the court is much inclined to the opinion, that, had Lynn become insolvent, a suit in equity might have been sustained, on this claim, against Finley & Lynn.

If it might, in equity, though not in law, be a "claim *or demand" upon the concern," there does not appear to be such a repugnancy [*250 between the bond and the articles as to induce the court to say that the bond, which, so far as is shown in this cause, was executed without imposition, and with a knowledge of its contents, binds the obligors further than they intended to be bound. The extrinsic circumstances relied on are certainly entitled to much consideration ; but they are not thought sufficiently decisive and unequivocal in their character, to justify a court of equity in restraining legal rights acquired under a solemn contract.

Though this is the principal object of the bill, it may be understood to contemplate something further. It prays for a settlement of all accounts, and for general relief. So far as the accounts between the parties are closed by the articles of dissolution, no reason can be assigned for opening them. But if rights, growing out of those articles, require a settlement, the plaintiff is entitled to an account. By a majority of the court, it is conceived, that if any profits had arisen on the jewelry store, independent of the goods on hand, and of the debts due to the store, the plaintiff is entitled to them. It is not probable, that there are such profits ; but it is very possible, that there may be. Large sums of money may have been received, and might either be on hand when the dissolution took place, or have been diverted to various uses. If such be the fact, the majority of the court is of opinion, that any fair construction of the articles gives those profits to the plaintiff. The contract is, that Adam Lynn shall have "the goods in the jewelry store, and all the debts due to that store, as a compensation in lieu of the profits arising from the whole business." Now, the profits of the jewelry store, if any, not existing in debts or goods, were certainly a part of the "profits of the whole business," and are, consequently, yielded to the plaintiff.

That this was the deliberate intention of the defendant, *is avowed in his answer. A proposition for a dissolution was, he says, [*251 made by him in writing and accepted by the plaintiff. That proposition is, "that the defendant should have the merchandise in the jewelry store, and the debts due to that store, as a compensation in lieu of the profits of the

Finley v. Lynn.

whole business ; that the complainant should hold the merchandise in the hardware store, and the debts due to it, and the profits of the trade." Now, the profits of the jewelry store are certainly a part of the "profits of the trade."

The plaintiff also claims a debt said to be due from the jewelry store to the hardware store. As all the debts due to the hardware store are obviously assigned to Finley, this debt becomes his property, unless his claim to it is relinquished by the undertaking to pay all debts due from the concern. The words of this undertaking are to be looked for in the condition of his bond. He is to "satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, or either of the said copartners, for or on account of or for the benefit of the said copartnership."

The terms of this stipulation appear to the court to be applicable to claims upon the copartnership, and not to claims of a part of the company on the other part. He is to satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, not to release the claim of one store upon the other. This is a claim which did not exist upon the copartnership, and which grows out of the articles of dissolution. Those articles assign to the plaintiff all the profits of the hardware store, as well as the debts due to it. They separate what was before united. They draw the distinction between the hardware and the jewelry store, and make the debt due to the hardware store a part of the profits of that store. *The residue of the condition does not affect the question, and need not be recited. It is, then, the opinion of a majority of the court, that, if there was really a debt due from the jewelry store to the hardware store, Finley is entitled to that debt. This is a proper subject for an account.¹

The plaintiff has probably not applied for this account in the court below, and it does not appear to be a principal object of his bill. This court, therefore, doubted whether it would be most proper to affirm the decree dismissing the bill, with the addition that it should be without prejudice to any future claim for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter was deemed the more equitable course.² The decree, therefore, is to be reversed, and the cause remanded, with directions to take an account between the two stores, and an account of the profits of the jewelry store, if the same shall be required by the plaintiff.

TODD, J., concurred in the opinion of the court, that the debt of Wells & Co. was a debt to be paid by Finley, but he differed upon the other part of the case, being of opinion, that the complainant was not entitled to a relief which, by his bill, he had made a merit of waiving.

Decree reversed, and the cause remanded, with directions to reinstate the injunction, and take an account, &c.

¹ But see *Van Scooter v. Lefferts*, 11 Barb. ² And see *Dupont v. Vance*, 19 How. 173; 140; *Finley v. Fay*, 17 Hun 67. *May v. Le Claire*, 11 Wall. 227.

De BUTTS v. BACON and others.*Usury.*

If an agent, who has, by permission of his principal, sold eight per cent. stock, applies the money to his own use, and being pressed for payment, gives a mortgage to secure the repayment of the amount of the stock, with eight per cent. interest thereon, it is usury.¹

ERROR to the Circuit Court for the district of Columbia, in a suit in chancery, brought by Samuel De *Butts against James Bacon and [*253 others, the object of which was to foreclose a mortgage made by Bacon to De Butts. The condition of the mortgage was, that if the defendant, Bacon, should pay to the complainant the interest of eight per cent. upon \$1000 of eight per cent. stock of the United States, loaned by the complainant to the defendant, and should further pay to the complainant "the said sum of \$1000," &c., the deed should be void.

The defendant, Bacon, pleaded the statute of usury, alleging that it was a loan of money and not of stock.

The facts of the case appeared to be, that the complainant, Samuel De Butts, intending to speculate in a voyage with Captain Elias De Butts, authorized the latter to sell \$1000 of eight per cent. stock of the United States, which he did through the agency of the defendant, Bacon, who received the money. The plan of the voyage not having been prosecuted, the complainant wished to get his stock back again, but could not get either the stock or the money from Bacon. It was however finally agreed, that Bacon should be considered as answerable for the stock, and should give a mortgage to secure the repayment of the stock, and eight per cent interest.

THE COURT below decided the contract to be usurious, and decreed the mortgage to be void. Which decree, this court, after argument, by *Swann* for the appellant, and *Youngs*, for the appellees,

Affirmed.

SHEEHY v. MANDEVILLE & JAMESON.*Payment by note.—Judgment against joint maker.—Amendments.*

A promissory note, given and received for and in discharge of an open account, is a bar to an action upon the open account, although the note be not paid.

A several suit and judgment against one of two joint makers of a promissory note, is no bar to a joint action against both upon the same note.²

The whole of a joint note is not merged in a judgment against one of the makers, on his individual *assumpsit*; but the other may be charged, in a subsequent joint action, if he pleads severally.

This court will not direct the court below to allow the proceedings to be amended.

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of *assumpsit*, *brought by Sheehy against Joseph [*254 Mandeville and R. B. Jamesson. The declaration consisted of three counts.

¹ In *Palmer v. Mead*, 7 Conn. 149, it is said, that this case was probably decided on the local law; it is not an authority in other states.

² This case, though sometimes criticised and doubted in other courts, goes no further than to decide, that when one partner is sued severally,

on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint contract. It gives no countenance to the

Sheehy v. Mandeville.

The first count was upon a promissory note as follows, viz : "James Sheehy complains of Joseph Mandeville and Robert Brown Jamesson, lately trading under the firm of Robert Brown Jamesson, of a plea of trespass on the case, for that, whereas, on the 17th day of July, in the year of our Lord 1804, the said defendant, Joseph Mandeville, secretly trading with the defendant, Robert B. Jamesson, by way of buying and selling merchandise, at Alexandria, in the county aforesaid, under the name, title, style and firm of Robert Brown Jamesson ; and whereas, the said defendants under the said name, firm and style, on the said 17th day of July, in the year 1804, at, &c., made their certain note in writing, called a promissory note, subscribed by them, by and under the name, style, title and firm of Robert B. James-son, bearing date the same day and year, and then and there delivered the said note to the plaintiff, and by the said note did, under their firm afore-said, promise to pay to the said plaintiff, or to his order, \$604.91, for value received, negotiable at the bank of Alexandria, by reason whereof, and by force of the law in such cases made and provided, the said defendants became liable to pay to the plaintiff the said sum of money contained in the said note, according to the tenor and effect of the said note ; and being so liable, they, the said defendants, under the name and firm aforesaid, afterwards, to wit, the same day and year aforesaid, at Alexandria aforesaid, undertook," &c. The second count was *indebitatus assumpsit* for goods sold and deliv-ered to the defendants, under the name and firm of Robert B. Jamesson. The third count was a *quantum valebant* for the same goods.

*255] * The defendants were duly arrested, but Jamesson was discharged by a judge, upon entering a common appearance, he having been before discharged under the act of congress for the relief of insolvent debtors within the district of Columbia ; and no further proceedings seem to have been had against him. The defendant Mandeville appeared and filed two pleas.

1st Plea. "And the said defendant, by George Youngs, his attorney, comes and defends the wrong and injury, when, &c., protesting that the

assertion, that a joint judgment is not *per se* a satisfaction of a joint and several bond. GRIER, J., in United States *v.* Price, 9 How. 95. But in Mason *v.* Eldred, 6 Wall. 236, Mr. Justice FIELD said, that the decision in this case had never received the entire approbation of the profession, and its correctness had been doubted and its authority disregarded, in numerous instances, by the highest tribunals of different states. It was elaborately reviewed by the supreme court of New York, in Robertson *v.* Smith, 18 Johns. 459, where its reasoning was declared unsatisfactory, and a decision ren-dered in direct conflict with its adjudication. In Ward *v.* Johnson, 13 Mass. 148, a similar ruling was made. In Ward *v.* McNulty, 2 Gilm. 359, the supreme court of Illinois declined to follow it as authority. So did the supreme court of Pennsylvania, in Smith *v.* Black, 9 S. & R. 142. And in King *v.* Hoare, 13 M. & W. 459, the English court of exchequer, on this case

being cited in the course of the argument, said, that though it had the greatest respect for any decision of Chief Justice MARSHALL, yet, the reasoning attributed to him in Sheehy *v.* Mandeville, was not satisfactory. In Trafton *v.* United States, 3 Story 651, Mr. Justice STORY observed, that the court of exchequer, in King *v.* Hoare, had pronounced what seemed to him a very sound and satisfactory judgment, and that for years he had entertained great doubts of the propriety of the decision in Sheehy *v.* Mandeville. And finally, in Mason *v.* Eldred, 6 Wall. 238, Mr. Justice FIELDS said, that if the common-law rule was to govern the case then before the court, they should feel obliged, notwithstanding Sheehy *v.* Mandeville, to hold that the promissory note, there in question, was merged in the judgment, and that the latter would be a bar to the action. Thus virtually overruling the case referred to.

Sheehy v. Mandeville.

said goods, wares and merchandise, in the declaration mentioned, were not sold and delivered to the said Robert B. Jamesson and this defendant jointly; for plea saith, that the said James ought not to have and maintain his action aforesaid against him, because he says, that heretofore, to wit, on the 17th day of July 1804, at Alexandria, the said Robert B. Jamesson, in the declaration named, made his promissory note, payable to the said James Sheehy or order, sixty days after date, for \$604.91, negotiable at the bank of Alexandria, which said note, so as aforesaid made by the said Jamesson, was given by the said Jamesson, to the said James Sheehy, and by him received, for and in discharge of an account or bill of the said James Sheehy against the said R. B. Jamesson, for sundry goods, wares and merchandise, at the special instance and request of the said R. B. Jamesson, sold and delivered by the said James to the said Robert B. Jamesson. And the said defendant, Joseph, avers, that the said goods, wares and merchandise mentioned in the plaintiff's declaration, are the same goods, wares and merchandise, so as aforesaid sold and delivered to the said Robert B. Jamesson by the said James Sheehy, and the same for which the said R. B. Jamesson gave his aforesaid negotiable note, and none other; and afterwards, to wit, on the 8th day of June 1805, the said James Sheehy sued out of the clerk's office of the circuit court of the district of Columbia for the county of Alexandria, his writ in an action of debt upon the aforesaid note, against the said Robert B. Jamesson, and such proceedings * were had therein, [*256 that at the July term of the said court, in the year 1806, a judgment was rendered in favor of the said James Sheehy, against the said R. B. Jamesson, for the debt and damages mentioned in the declaration filed in that action, to be discharged by the payment of the said \$604.91, with interest from the 15th of September 1804, till paid, which will at large appear by the records of the said court, now here remaining in the said circuit court of the district of Columbia, for the county of Alexandria, which judgment still remains unreversed and in full force; all of which the said defendant is ready to verify; wherefore, he prays judgment, whether the said plaintiff his action aforesaid ought to have and maintain against him, upon the second and third counts in the said declaration," &c.

2d Plea. "And the said defendant, by leave of the court," &c., "for further plea saith, that the plaintiff his action aforesaid against him ought not to have and maintain, on the first count in his said declaration, because he saith, that heretofore, to wit, on the 8th day of June 1805, the said James Sheehy sued out of the clerk's office of the circuit court of the district of Columbia, for the county of Alexandria, his writ in an action of debt against the said Robert B. Jamesson, and afterwards, in July, filed his declaration therein, upon a note of the said Robert B. Jamesson to the said James Sheehy, dated the 17th day of July 1804, payable sixty days after date, for \$604.91, for value received, negotiable at the bank of Alexandria; and afterwards, such proceedings were had in the said suit, that at July term of the said court, in the year 1806, judgment was rendered therein in favor of the said James Sheehy against the said Robert B. Jamesson, for the debt and damages in the said declaration mentioned, to be discharged by the payment of \$604.91, with interest from the 15th of September 1804, until paid, and also costs of suit; all which the said defendant is ready to verify by the record and proceedings of the said court," &c.; "which said judgment still

Sheehy v. Mandeville.

remains unreversed and in full force, also to be verified by the record, &c.
 *257] And the *said defendant avers that the promissory note in the first count in the plaintiff's declaration mentioned and described, is the same note upon which the aforesaid judgment was rendered and obtained against the said Robert B. Jamesson, as aforesaid, and not other or different, and this the said defendant is ready to verify; whereupon, the defendant prays judgment if the said plaintiff ought to have and maintain his action aforesaid against him, upon the first count in the said declaration," &c.

To the first plea, the plaintiff demurred, and assigned as causes of demurrer: 1. That the plea does not traverse the *assumpsit* laid in the declaration. 2. It does not expressly confess or deny that the goods were sold and delivered to the said Joseph Mandeville and Robert B. Jamesson; nor that the note in the declaration mentioned, was given by the said house and firm of Robert B. Jamesson. 3. An unsatisfied judgment against Robert B. Jamesson is no bar to an action upon the same cause of action, against the other defendant, against whom no judgment has been rendered. 4. It does not aver that the judgment against Jamesson has been satisfied. 5. It does not deny or admit that the defendant, Mandeville, assumed to pay for the goods. 6. The plea is no answer to the declaration.

To the second plea, the plaintiff also demurred, and assigned the same causes of demurrer.

The judgment of the court below, upon these demurrs, was in favor of the defendant Mandeville; and the plaintiff brought his writ of error.

*258] *E. J. Lee, for the plaintiff in error.—A debt due from joint partners is joint and several. Each is liable for the whole. *Rice v. Shute*, 5 Burr. 2613; Watson's Law of Partnership, 238; 3 Caines 5; 14 Vin. Abr. 607, pl. 3; *Mildmay's Case*, 6 Co. 40 b; *Higgins's Case*, Ibid. 46 a; *Yelv.* 67; *Darwent v. Walton*, 2 Atk. 510; 3 Caines 4; 5 East 147; Cro. Jac. 74. A judgment against one partner alone does not bind the other. It is, therefore, no bar to a suit against this other partner. The obligation of the note of Mandeville & Jamesson is not merged in the judgment against Jamesson. Mandeville cannot say he has been twice vexed for the same cause of action.

A secret partner is liable, when discovered. Watson 42; Doug. 371. If the creditor has obtained judgment against the open partner, before the discovery of the secret partner, the latter may be sued upon the original cause of action. As to him, it is not merged in the judgment. An unsatisfied execution is no bar to a second remedy against another person liable for the same debt. 5 Co. 86 b; Cro. Jac. 73; 1 Mod. 207.

A promissory note, given for goods, is no bar to an action for the price of the goods, founded on the sale. In the present case, it is not pleaded as an accord and satisfaction, and it is in that form only that the defendant can avail himself of it. It is not satisfaction, unless it be paid. 1 Esp. 148; 9 Co. 79 b; 1 Selw. 107; 1 Str. 426; 1 Burr. 9; 2 T. R. 24; 1 Selw. 108, 109.

Although the plea states that the note was received in discharge of the account for goods sold, yet it was not a discharge, without payment. *Braintwait v. Cornwallis*, Cro. Car. 85-86; 6 Co. 44 b, 45 b; *Ashbrook v. Snape*, Cro. Eliz. 240; *Drake v. Mitchel*, 3 East 250; *McGuire v*

Sheehy v. Mandeville.

Gadsby, 3 Call 234; 1 Cranch 181; *Stedman v. Gooch*, 1 Esp. 3, 5; *Puckford v. Maxwell*, 6 T. R. 52.

*The judgment (against Jamesson) upon the note is no discharge of Mandeville. The cause of action against Jamesson only is merged in the judgment; not the joint cause of action against Mandeville and Jamesson. The reason why the cause of action merges in the judgment is, that the party has obtained a remedy of a higher nature against his debtor. But a judgment against Jamesson gives no remedy against Mandeville. The plaintiff could not lose his remedy upon the note against Mandeville, until he had obtained another remedy of a higher nature against him. This he has not obtained, and therefore, has not lost his remedy upon the note.

In the former action, the declaration does not state it to be a joint note. If it had, there might perhaps be some doubt. But it was sued as the separate note of Jamesson. If the note had been in terms joint and several, a judgment against one would not have been a bar to a subsequent action upon the note against the other.

Youngs and C. Lee, contrâ.—The contracts made by copartners are joint, and not several. It is true, that the effect of a judgment is several, that is, the execution may be served on both, or either of the defendants; but that does not alter the nature of the contract.

In joint contracts, both are bound, or neither is bound. If one be discharged, the other is discharged; a release to one, is a release to both. If the contract be destroyed or vacated as to one, it is as to the other also. When it has once passed into a judgment, it is extinct; a plaintiff may, if he pleases, sue only one of the copartners, and if the defendant does not plead in abatement, the action may be maintained; and if the plaintiff obtains a judgment against one, he cannot have another action upon the same original cause of action against the other. This would enable the plaintiff to split and multiply actions at his pleasure. Upon a joint cause of action, you cannot have several judgments *as you can in trespass, although the defendants should plead severally.

If a note be given for a precedent debt, you cannot have an action on the original cause of action, unless you can prove the note to be lost. 1 Johns. 36; 4 Esp. 159; 1 Com. Dig. 143, 144; 4 Bac. Abr. 48, 49; 2 Salk. 609; 2 Atk. 510, 609. But the plea states that the note was given and received in discharge of the prior debt; and there can be no doubt, that, by agreement of the parties, a debt may be discharged in that way.

The declaration does not state any reason for not having made Mandeville a defendant to the first suit. It ought, at least, to have stated that the plaintiff did not know that Mandeville was a partner, at the time of obtaining the judgment against Jamesson. If the plaintiff has any remedy, it must be in equity. If there can be a remedy at law, it must be upon a very special action on the case, setting forth all the circumstances.

If the plaintiff had, at first, an option to sue for goods sold and delivered, or upon the note, he has made his election to sue on the note, and having prosecuted that suit to judgment, he cannot afterwards sue for the goods sold and delivered. A man cannot have two judgments for the same cause of

Sheehy v. Mandeville.

action. If the note did not destroy the right of action for goods sold, yet a judgment upon that note does.

A written instrument cannot be contradicted by parol evidence. The note purports to be the separate note of Jamesson. To show that it was a joint note, is to contradict the tenor of the instrument.

If the defendants in a joint action of *assumpsit* sever in their pleas, this does not make it a separate action against each : and if the plaintiff does not show a joint cause of action against both, he cannot recover against either.

There could be no doubt, that it would *be a good plea for Jamesson, [261] to say that the plaintiff had already recovered a judgment against him upon the same cause of action, which judgment was still in force. And a plea that would discharge Jamesson, would discharge Mandeville also, because the plaintiff having declared upon a joint cause of action, must prove it as laid ; and if he had no cause of action against Jamesson, as well as against Mandeville, he had no joint cause of action as laid in his declaration.

Jones, in reply.—A judgment against one, severally, upon a joint cause of action, is no bar to a subsequent action against the others, upon the same cause of action.

A note given by one, for a precedent debt due by two, is *nudum pactum*.

A note cannot be a satisfaction of a precedent debt, unless payment be actually made of the note. Cro. Jac. 152; *Whelpdale's Case*, 5 Co. 119; 14 Vin. 607; 6 Co. 49 b; Cro. Jac. 74; 12 Mod. 538; 5 Ibid. 136; Cro. Car. 85, 86; 1 Esp. 3, 5; 3 East 256.

Judgment may be severed, when the parties plead severally. Co. Litt. 127 b; Lutw. 9; 5 Com. Dig. 8, tit. Pleader, B. 9, 10; *Hayden's Case*, 11 Co. 5; 1 Wils. 89; 1 Burr. 357.

Jamesson is no party to this suit. Although arrested, he has never appeared, and the suit as against him has been abandoned. The court can give judgment against Mandeville only.

The plea amounts to the general issue, and therefore, is bad upon demurrer. Cro. Eliz. 201; 5 Mod. 314.

March 14th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows, viz :—The plaintiff sold certain goods to Robert B. Jamesson, [262] *a merchant of Alexandria, and took his note for the amount, which he put in suit, and prosecuted to a judgment. Afterwards, supposing the other defendant Mandeville to be a secret partner, he instituted a suit against Mandeville and Jamesson. The declaration contains three counts. The first is on the note, and charges it to have been made by the defendants, under the name, firm and style of Robert B. Jamesson. The 2d and 3d counts are for goods, wares and merchandise sold and delivered to the defendants, trading under the firm of Robert B. Jamesson.

The defendant Mandeville pleads two pleas in bar. The first goes to the whole declaration, and the second applies only to the first count. The first commences with a protestation that the goods, &c., in the declaration mentioned were not sold to the defendants jointly, and then pleads in bar the promissory note which is averred to have been given and received for, and in discharge of, an account for sundry goods, wares and merchandise sold and delivered to the said Jamesson, and that the goods in the declara-

Sheehy v. Mandeville.

tion mentioned are the same which were sold and delivered to the said Jamesson, and for which the said note was given. The plea also avers, that a suit was instituted and judgment obtained on the note, and concludes in bar. The second plea pleads the judgment in bar of the action.

To the first plea, the plaintiff demurs specially, and assigns for cause of demurrer. 1. That the defendant does not traverse the *assumpsit* laid in the declaration. 2. That he does not expressly confess or deny that the goods, &c., were sold and delivered to the defendants, trading under the firm of R. B. Jamesson, or that the note was given by the said firm. *3. Because an unsatisfied judgment against Jamesson is no bar to [*263] an action against Mandeville. 4. It is not averred that the judgment has been satisfied. 5. The defendant does not deny or admit that he assumed to pay for the goods, &c., in the declaration mentioned. 6. Because the plea is no answer to the declaration, or any count thereof, and is informal. The defendant joins in demurrer.

To the second plea, the plaintiff also demurs specially, and assigns, for cause of demurrer, the same, in substance, which had been assigned to the first plea, and the defendant joins in the demurrer to this plea likewise. The other defendant, Jamesson, has put in no plea, nor are there any proceedings against him, subsequent to the declaration.

Although the first plea is not expressly limited to the 2d and 3d counts, yet it would seem, from its terms, to be intended to apply to them alone. It sets up a bar to an action on an *assumpsit* for goods, wares and merchandise sold and delivered, and no such *assumpsit* is laid in the first count. If, however, it be considered as pleaded to the first count, it is clearly ill, on demurrer. For it does not deny or avoid the joint *assumpsit* laid in that count.

It remains to inquire, whether this plea contains a sufficient bar to the 2d and 3d counts. The plea is, that the note was given and received for, and in discharge of, an account or bill for goods, wares and merchandise sold and delivered by the plaintiff to Robert B. Jamesson, which are the same goods, &c., that are mentioned in the plaintiff's declaration.

*That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted, [*264] that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties or of a third person may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor, without any consideration. But if it did apply, there may be inducements to take a note from one partner, liquidating and evidencing a claim on a firm, which might be a sufficient consideration for discharging the firm. Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods.

The special causes of demurrer which are assigned do not, in any manner, affect the case. Whether the promise was made by Mandeville, or not, ceases to be material, if a note has been received in discharge of that prom-

Sheehy v. Mandeville.

ise, and the payment of the note need not be averred, since its non-payment cannot revive the extinguished *assumpsit*.

The next subject of consideration is the second plea, which applies singly to the first count. That count is on a note charged to have been made by Mandeville and Jamesson, trading under the firm of Robert B. Jamesson. This, not being denied, must be taken as true. The plea is, that a judgment was rendered on this note against Robert B. Jamesson. *Were it admitted, that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound, if a suit could be originally maintained against him, is the note, as to him, also merged in the judgment?

Had the action, in which judgment was obtained against Jamesson, been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said, that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which, most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract.

In point of real justice, there can be no reason why an unsatisfied judgment against Jamesson should bar a claim upon Mandeville; and it appears to the court, that this claim is not barred by any technical rule of law, since the proceedings in the first action were instituted upon the *assumpsit* of Jamesson individually.

It is not necessary to decide whether this action could have been maintained against Mandeville singly, with an averment that the note was made by Mandeville and Jamesson. The declaration being against both partners, that question does not arise. The declaration is clearly good in itself, and the plaintiff may recover under it, unless he be barred by a sufficient plea.

*266] Admitting, for the present, that a previous judgment *against Jamesson would be a sufficient bar, as to him, had Jameson and Mandeville joined in the same plea, it would have presented an inquiry of some intricacy, how far the benefit of that bar could be extended to Mandeville. But they have not joined in the same plea. They have severed; and as the whole note is not merged in a judgment obtained against Jamesson, on his individual *assumpsit*, the court is not of opinion, that Mandeville has so pleaded this matter as to bar the action.

In this plea, it was necessary to negative the averment of the declaration, that the note was made by Mandeville as well as Jamesson, or to show that the judgment was satisfied. The defendant has not done so. He has only stated affirmatively new matter in bar of the action, which new matter, as stated, does not furnish a sufficient bar. It is not certain, that this plea would have been good, on a general demurrer, but on a special demurrer, it is clearly ill.

The judgment, therefore, is to be reversed, and, as no other plea is

Skillern v. May.

pledged, judgment must be rendered, on the first count, in favor of the plaintiff.

THE JUDGMENT of the court was as follows : This cause came on to be heard, on the transcript of the record, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in the judgment of the circuit court in overruling the demurrer to the first plea, so far as the same is pleaded in bar of the first count in the declaration, and that there is error in overruling the demurrer to the second plea ; wherefore, it is considered by this court, that the judgment of the circuit court be reversed and annulled, and that the cause be remanded to the circuit court, with directions to sustain the demurrer to the first plea, so far as the same is pleaded in bar of the first count, in the plaintiff's declaration, and also to sustain the demurrer to the second plea, and to render *judgment in [*267 favor of the plaintiff on his said first count, and to award a writ of inquiry of damages.(a)

SKILLERN'S Executors v. MAY'S Executors.*Jurisdiction.*

It is too late to question the jurisdiction of the circuit court, after the cause has been sent back by mandate.

THIS was a case certified from the Circuit Court for the district of Kentucky, the judges of that court being divided in opinion.

The former decree of the court below had been reversed in this court, and the cause "remanded for further proceedings to be had therein, in order that an equal and just partition of the 2500 acres of land, mentioned in the assignment of the 6th of March 1785, be made between the legal representatives of the said George Skillern and the said John May." (4 Cr. 141.)

The cause being before the court below upon the mandate, the question occurred which is stated in the following certificate, viz : "In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to this court, it was discovered to be a cause not within the jurisdiction of the court ; but a question arose, whether it can now be dismissed for want of jurisdiction, after the supreme court had acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered, "that the same be adjourned to the supreme court for their decision," &c.

THIS COURT, after consideration, directed the following opinion to be certified to the court below, viz : * "It appearing that the merits of [*268 this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court, that

(a) After the opinion was given, C. Lee moved for a direction to the court below to allow a plea of *non assumpsit*. The court said, they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say, whether the court below would be justified in granting leave to amend.

Chesapeake Insurance Co. v. Stark.

the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings."¹

CHESAPEAKE INSURANCE COMPANY v. STARK.

Marine insurance.—Abandonment.—Authority of agent.—Special verdict.

The agent who makes insurance for his principal, has authority to abandon, without a formal letter of attorney.

The informality of a deed of cession is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the right of either party.

If the abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters.

A special verdict is defective, which does not find whether the abandonment was in reasonable time.²

What is reasonable time of abandonment, is a question compounded of fact and law, which must be found by a jury, under the direction of the court.³

ERROR to the Circuit Court of the district of Maryland, in an action of covenant, upon a policy of insurance upon goods on board the ship Minerva, from Philadelphia to Laguayra, and back to Philadelphia. The cause was tried upon the issue of *non infregit conventionem*, and the jury found a special verdict, stating the following facts :

On the 5th of March 1807, Christian Dannenberg, as agent of the plaintiff, who was a citizen of Pennsylvania, shipped for Laguayra, on account, and at the sole risk, of the plaintiff, sundry goods, being American property, and regularly documented as such, to the value of \$8700 and upwards, on board the ship Minerva, and consigned them to William Parker, supercargo on board. On the 12th of March, she sailed with the goods from Philadelphia for Laguayra.

On the 21st of March, Charles G. Boerstler, for the plaintiff, effected an insurance with the Chesapeake Insurance Company, who are citizens of the state of Maryland, upon the goods, to the amount of \$8700, by the policy mentioned in the declaration, which was executed under the common seal of the company.

On the outward voyage, she was captured by a British privateer, and carried into Curaçoa. On the 29th of April 1807, the master made a ^{*269]} protest. On the 13th ^{*}of June 1807, the ship and goods being still in possession of the captors, at Curaçoa, and there detained by them, the said Charles G. Boerstler, "for the plaintiff," abandoned to the Chesapeake Insurance Company, the goods shipped by Dannenberg for the plaintiff, by a letter to the president and directors of the Chesapeake Insurance Company, the defendants, in the words and figures following :

"Baltimore, June 13, 1807.

"President and Directors of the Chesapeake Insurance Company,
"Gentlemen :—Having this morning received a letter from Mr. C. Dan-

¹ S. P. Livingston v. Story, 12 Pet. 339; Sibald v. United States, Id. 488; Chaires v. United States, 3 How. 611; Whyte v. Gibbes, 20 Id. 541.

² See Prentice v. Zane, 8 How. 470.
³ Maryland Ins. Co. v. Ruden, *post*, p. 338; Livingston v. Maryland Ins. Co., 7 Cr. 506; Duncan v. Koch, Wall. C. C. 33.

Chesapeake Insurance Co. v. Stark.

nenberg, of Philadelphia, the agent for Mr. John Philip Stark, of Hanover ordering me to abandon the goods shipped by him, for Mr. Stark's account, on board the American ship Minerva, Captain Newcomb, carried into, and, detained at Curaçoa, on her voyage from Philadelphia to Laguayra, whereby the object of the expedition is totally frustrated and destroyed ; I here-with abandon to you the whole of Mr. Stark's interest in the cargo of the Minerva, which you have insured in your office. I have the honor to be, gentlemen, your most obedient servant,

CHARLES G. BOERSTLER."

Which abandonment the defendants then refused to accept.

W. Parker, the supercargo, addressed a memorial to the governor of Curaçoa, on the 19th of June 1810, in which he complained of the detention as being of the most ruinous consequences to the owners. On the 25th of July 1807, the vessel and cargo being still detained at Curaçoa, in the possession of the captors, Parker entered into an agreement with I. F. Burke, the owner of the privateer, by which a certain *part of the goods should be appraised, and the price paid by Parker, to be repaid by Burke, in case the goods should not be adjudged good prize ; and that a certain other part should be kept by Burke, upon his engaging to pay the value thereof, in the like case. In consequence of which agreement, the vessel was liberated, and proceeded to Laguayra, where the goods were sold, and produced about \$5900. Parker employed an agent to attend the trial at Tortola, and to claim the goods for the plaintiff ; but a trial was never had, nor any proceedings instituted for the purpose of obtaining an adjudication.

On the 22d of August 1807, Dannenberg, as agent of the plaintiff, executed a deed to the Chesapeake Insurance Company, transferring to them all his right and title to the goods, as attorney of the plaintiff, which deed they refused to receive.

Winder and Martin, for the plaintiffs in error, contended : 1. That the contract by Parker with Burke was either the personal contract of Parker, or the contract of Stark ; and was the cause of the loss. 2. That there was no sufficient abandonment. Dannenberg was the agent of the plaintiff to make the shipment, but he had no power to abandon, nor to transfer to the defendants the rights of the plaintiff. Much less could Boerstler, the friend of Dannenberg. If the vessel and cargo had returned after the abandonment, there was nothing to prevent Stark from claiming. The deed of cession ought to have been under the plaintiff's seal, or a power of attorney, under seal, should be produced. 3. The abandonment was not in due time.

Harper, contrâ.—If the authority of Dannenberg to abandon does not appear in the special verdict, nor the time when he received notice of the loss, this court will award a *venire facias de novo*, because the jury have found the evidence of the authority and time, but not the fact of authority, nor the reasonableness of the time.

In a mercantile transaction, no instrument under seal is necessary. The letter is found, which states the fact of abandonment, and the jury find the agency of Dannenberg. The letter states the authority of Boerstler, and

Chesapeake Insurance Co. v. Stark.

the jury have found his authority. This throws the burden of proof on the other side. The deed of cession from Dannenberg states that he acts for Stark, and as his attorney. The jury find that it was done by Dannenberg for Stark. It was not necessary that the deed should have been executed in the name of Stark. It is as well, if it be signed by Dannenberg, as his agent or attorney.

After the abandonment, Parker became the agent of the underwriters, who were then the owners. It is a general principle, that all acts done *bona fide* for the best interest of all concerned, are the acts of the underwriters, after a rightful abandonment. The assured cannot then revoke; nor can the underwriters throw back the property, without the consent of the assured.

Martin, in reply.—The question is, whether the assured can elect, by attorney, to abandon. Parker could not be considered as the agent of the underwriters, in doing an act which could not benefit them.

The plea of *non infregit* was decided, before the statute of *jeofails*, to be an informal, but not an immaterial plea. 1 Sid. 183; 1 Lev. 290. It would have been bad, upon special demurrer, but it is aided by the verdict. No other form of pleading has ever been used in Maryland, upon a sealed policy.

*March 14th, 1810. MARSHALL, Ch. J., delivered the opinion of *272] the court, as follows:—On the principal question in this case, the court can entertain no doubt: on the capture of the *Minerva*, the right to abandon was complete, and this right was exercised during her detention.

The objections to the form of the abandonment are not deemed substantial. The agent who made the insurance might certainly be credited, and in transactions of this kind, always is credited, when he declares that, by the order of his principal, he abandons to the underwriters. In this case, the jury find that the abandonment was made for the plaintiff; and this finding establishes that fact.

The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the right of either party. Had it been demanded and refused, that circumstance might have altered the law of the case.

If the abandonment was legal, it put the underwriters completely in the place of the assured, and Parker became their agent. When he contracts on behalf of the owners of the goods, he contracts on behalf of the underwriters, who have become owners, not on behalf of Stark, who has ceased to be one. His act is no longer the act of Stark, and is not to be considered as an interference, on his part, which may affect the abandonment. If any particular instructions had been given on this subject, if any act of ownership had been exerted by Stark himself, such conduct might be construed into a relinquishment of an abandonment, which had not been accepted; but as nothing of the kind exists, the act of the supercargo is to be considered as the act of the persons interested, whoever they may be.

¹ See *Columbian Ins. Co. v. Ashby*, 4 Pet. 139.

Livingston v. Maryland Insurance Co.

*The only point which presents any difficulty in the opinion of the court, is the objection founded on the omission, in the verdict, to find that the abandonment was made in reasonable time. The law is settled, that an abandonment, to be effectual, must be made in reasonable time; but what time is reasonable, is a question compounded of fact and law, which has not yet been reduced to such certainty, as to enable the court to pronounce upon it, without the aid of a jury. Certainly, the delay may be so great as to enable every man to declare, without hesitation, that it is unreasonable, or the abandonment may be so immediate, that all will admit it to have been made in reasonable time: but there may be such a medium between these extremes, as to render it doubtful, whether the delay has been reasonable or otherwise. If it was a mere question of law, which the court might decide, then the law would determine, to a day or an hour, on the time left for deliberation, after receiving notice of the loss. But the law has not so determined, and it, therefore, remains a question, compounded of fact and law, which must be found by a jury, under the direction of the court.

In this case, the jury have found an abandonment, but have not found, whether it was made in due time, or otherwise. The fact is, therefore, found defectively; and for that reason, a *venire facias de novo* must be awarded.

It may not be amiss to remark, that the judicial opinions which we generally find in the books, on these subjects, are usually given by way of instruction to the jury, or on a motion for a new trial, not on special verdicts. The distinction between the cases deserves consideration.

Judgment reversed, and the cause remanded, with direction to award a *venire facias de novo*.

*LIVINGSTON & GILCHRIST v. MARYLAND INSURANCE COMPANY. [*274]

Marine insurance.—Warranty of neutrality.—Misrepresentation and concealment.—Abandonment.

If the interest of one joint-owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality, if the other joint-owner, whose interest is not insured, be a belligerent.

The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

The effect of a misrepresentation or concealment upon a policy, depends upon its materiality to the risk, which must be decided by a jury, under the direction of a court.

The right to abandon may be kept in suspense, by mutual consent.

If foreign laws and regulations respecting trade be not proved to have been in writing, as public edicts, they may be proved by parol.

If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board, will vacate the policy.

ERROR to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy (of insurance against capture only) upon goods laden on board the ship Herkimer, from Guyaquil, or her last port of discharge in South America, to New York; the goods were warranted to be American property, "proof of which to be required in the United States only." The

Livingston v. Marine Insurance Co.

ship and cargo were captured by a British ship of war, and condemned at Halifax as prize.

The defence set up by the underwriters was : 1. That one Baruso, a Spanish subject, was interested in the cargo, and that Baruso, being a subject of one of the belligerents, the warranty of neutrality was forfeited. 2. That certain Spanish papers were found on board, stating the cargo to be the property of Baruso, and although Baruso might not be interested in the cargo, yet these papers, not being necessary, according to the usual course of the trade, were the cause of the condemnation, and as this cause proceeded from the act of the assured, the underwriters were not liable. 3. That although the interest of the plaintiffs Livingston & Gilchrist, was neutral, yet the concealment of the interest of Baruso, vitiated the policy. 4. That the abandonment was not made in due time.

To these objections, the plaintiffs answered : 1. That Baruso was not part owner of the goods ; he had only a contingent interest in the profits of *275] the voyage. That the subject insured was only the interest *of the plaintiffs, which was strictly neutral property. 2. That the Spanish papers were necessary to carry on the voyage insured, according to the nature and course of the trade. 3. That the interest of Baruso was not such as they were bound to disclose.

Upon the trial of the issue of *non infregit conventionem*, the jury found a special verdict ; and a bill of exceptions was taken by the plaintiffs in error to the instruction of the court to the jury, that parol evidence was not competent to prove, "that according to the uniform and long-standing laws of Spain, relative to the trade of her colonies in America, and especially of Peru, no goods could, at and about the time of the making the policy in the declaration mentioned, be imported into, or exported from, the colony of Peru, from or to any other than a Spanish port in Europe, or in any other than a Spanish bottom, without a special license from the King of Spain for that purpose, and that such licenses, at and about the said time, were never granted, with respect to the said colony of Peru, to any but Spanish subjects ; and that, according to the constant course and usage of the trade, to and from that colony, under such licenses, it was usual and necessary for the property to appear, in the said colony, and at its departure therefrom, as the property of a Spanish subject, and of the person holding the license, to be accompanied by such Spanish papers as were necessary to give it that appearance, and to be cleared out as such, from the port of departure in Peru ; such licenses, not being avowedly transferable ; although by observing the above-mentioned formalities and precautions, American property, at and about the said time, might be, and sometimes was, imported into, and exported from, the said colony, by American citizens, by virtue, and under the protection of such licenses."

The order for insurance, which was supposed to *amount to a *276] representation, that the whole cargo was neutral property, was contained in a letter from the plaintiff Gilchrist to Webster & Co., at Baltimore, in which he says, "on the recommendation of Messrs. Church & Demmill, I take the liberty of requesting you to effect insurance in your city on the cargo of the ship Herkimer, Church, master, from Guyaqil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account

Livingston v. Marine Insurance Co.

of seizure for illicit or prohibited trade. The owners are already insured against the dangers of the seas, and all other risks except that of capture. You will please to insure to the amount of \$50,000 in valued policies. You have already had a description of the ship from Messrs. Church & Demmill, the agents of Mr. Jackson, who is the owner, and which I presume is correct. By a letter received from Mr. James Baxter, the supercargo, dated at Lima, the 23d of September 1805, he did not expect the Herkimer would sail from Guyaquil, until the last of February. I think proper to mention, that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture, that in his letter from Lima, he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The description of the ship, as given by Church & Demmill, and referred to in the above letter, was as follows : "She is a fine ship of about 400 tons burden, about three years old, sheathed and coppered to the bends, built in the state of New York, and her owner a native American citizen. She sailed from Boston, on the 12th day of May last, bound for Lima, with liberty to go to one other port in South America, not west of Guyaquil, and from thence to New York. She has permission to trade there."

*On the 5th of June 1806, the plaintiff Gilchrist, wrote to Webster & Co., at Baltimore, informing them of the capture of the vessel, [*277 and that the plaintiffs had sent an agent to Halifax, to act in behalf of the concerned, and desiring that this information should be communicated to the underwriters, and assurances that the plaintiffs should act throughout with due regard to their respective interests. He then says, "I should like them to approbate the owners in taking every measure they may judge best for our mutual interest, without prejudice to our right. I ought likewise to mention, that one of the owners has also gone in her, so the underwriters will observe every measure calculated to protect their and our interest has been speedily pursued." This letter was laid before the underwriters, who returned it with their answer indorsed thereon, "read and approved."

On the 22d of August 1806, after the condemnation in the court of vice-admiralty, the plaintiffs abandoned to the underwriters.

The cause was argued at great length by *Harper*, for the plaintiffs in error, and by *Winder*, *Key* and *Martin*, for the defendants, but their arguments were principally upon points not decided by the court.

March 16th, 1810. *MARSHALL*, Ch. J., delivered the opinion of the court, as follows :—In this case, several questions have occurred, on which the court has not yet formed an opinion. The application of rules and principles, which have been framed for an action on the case, to an action of covenant, is an operation of some difficulty. The court has not decided with precision, on the extent of the plea, that the defendant has not broken his covenant, nor on the testimony which may be admitted under that plea. Some difficulty, also, arises from the circumstances, that the parties have gone to trial under the expectation that the whole merits of the case were *open, under the issue which was joined, and that such expecta- [*278

Livingston v. Marine Insurance Co.

tion was authorized by the invariable usage of the courts of Maryland, and of the circuit court sitting in that state.

Upon the inspection of the special verdict in this case, it is supposed, that however these points may be decided, a *venire facias de novo* would probably be awarded; and, as the delay of a term would be a great inconvenience to the parties, it is deemed advisable to award it now.

There are, however, some points, which have been argued at great length, on which an opinion has been formed, which will now be delivered. It is essential, in this form of action, especially, to distinguish accurately between the warranty contained in the policy, and those extrinsic circumstances, such as misrepresentation or concealment, which have been deemed sufficient to discharge the underwriters. Although the effect of a breach of a warranty, and of a material misrepresentation, may be the same on a policy, yet they cannot be confounded together, in deciding on pleadings or on a special verdict.

The warranty, in this case, is in these words; "warranted, by the assured, to be American property, proof of which to be required in the United States only." The interest insured is admitted to be American property, in the strictest sense of the term; but it is contended, that Baruso, a Spanish subject, had an interest in the cargo, which falsifies the warranty. Whether Baruso could be considered as having an interest in the cargo, or not, is a question of some intricacy, which the court has not decided; and which, if determined in the one way or the other, would not affect the warranty; because, the assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

*If the assured represented the whole cargo to be neutral, when it was not, or if they concealed the interest of a belligerent, when it ought to have been disclosed, which facts this court neither affirm nor deny, the effect of the misrepresentation or concealment on the policy, depends on its materiality to the risk. This must be decided by a jury, under the direction of a court. In this case, it has not been decided. Consequently, were it even to be admitted, that, under the peculiar circumstances of this case, these facts might be taken into consideration, without being specially pleaded, a *venire facias de novo* would be necessary, in order to ascertain their materiality.

So, too, with respect to the Spanish papers found on board. It is said, that the verdict finds their materiality, by finding that the fair premium on American property, disguised as Spanish, on the voyage insured, was twenty-five per cent., whereas, the premium, in this case, was only ten per cent. But it does not appear to the court, that this property was, by these papers, disguised as Spanish. It is found to have been the constant course of the trade to have them on board, and consequently, they cannot be understood to disguise the property as Spanish, when there are other papers which prove it to be American. It is, too, as yet, undecided, that this matter could be given in evidence, on this issue.

Although this verdict, and these pleadings, do not present the merits of the cause in such form as to enable the court to decide them, there are some insulated points, from which the cause may be relieved.

The reference to the letter of Church and Demmill, which was made by the assured, in their letter of the 26th of March, to Alexander Webster &

Hudson v. Guestier.

Co., has *been treated both as a representation, and as a warranty, which is falsified by the sentence of condemnation. There is no color for this opinion. Most clearly it is not a warranty, for it is not introduced into the policy; and if it were a representation, it only goes to the actual state of the ship, at the time, not to her future conduct. But it is not even a representation. Marshall 336, is full and clear on this point.

The letter of the assured, of the 5th of June, is understood to ask the permission of the underwriters to keep their right to abandon in a state of suspense, and the note made by the president and directors, on that letter, is understood, as granting that permission. It is difficult to ascribe this letter to any other motive. It has been asked, for how long a time is this permission given? The answer is obvious. It is, at least, to continue while the property continued in its then situation, unless it should be sooner determined by one of the parties. The assured might abandon previous to the sentence, or immediately afterwards; and the underwriters might, at any time, require the assured to elect immediately, either to abandon or to waive the right so to do. Since they have not made this communication, their original permission continued in force. But the jury have not found that the abandonment was or was not in due time.

It is, also, the opinion of the court, that as the laws and regulations, by which this trade was regulated, are not proved to have been in writing, as public edicts, but may have depended on instructions to the governor, they may be proved by parol.

The judgment is to be reversed, because the special verdict is defective; and the cause remanded, with directions to award a *venire facias de novo*.

*In the second case, it is ordered to be certified, that, if the jury [*281] should be of opinion, that the Spanish papers, mentioned in this case, were material to the risk, and that it was not the regular usage of the trade insured to take such papers on board, the non-disclosure of the fact that they would be on board, would vitiate the policy; but if the jury should be of opinion, that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy.'

HUDSON and SMITH v. GUESTIER.

National jurisdiction on the high seas.—Effect of reversal.

The jurisdiction of the French courts, as to seizures, is not confined to seizures made within two two leagues of the coast.

A seizure, beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations.

When the reversal is in favor of the defendant, upon a bill of exceptions, a new trial must be awarded by the court below.

Rose v. Himely, 4 Cr. 241, overruled, in part.

ERROR to the Circuit Court for the district of Maryland, in an action of trover, for coffee and logwood, the cargo of the brig Sea Flower, which had been captured by the French, for trading to the revolted ports of the island of Hispaniola, contrary to the ordinances of France, and carried into the

¹ For a further decision in this case, upon the merits, see 7 Cr. 506.

Hudson v. Guestier.

Spanish port of Baracoa, but condemned by a French tribunal, at Guadalupe, sold for the benefit of the captors, and purchased by the defendant Guestier.

Upon the former trial of this case, in the court below, a statement of certain facts was agreed to by the counsel for the parties, and read in evidence to the jury, who then found a verdict for the plaintiffs. One of the facts so admitted, and which was then deemed wholly immaterial by both parties, was, that the Sea Flower was captured within one league of the coast of the island of Hispaniola. Upon this fact, which was the only fact in which this case differed from that of *Rose v. Himely* (4 Cr. 241), the supreme court reversed the first judgment of the court below (*Ibid.* 293), which had been for the plaintiffs, and remanded the cause for further proceedings. Upon the second trial in the court below, the verdict and judgment were for the defendant.

*282] *The plaintiffs took a bill of exceptions to the opinion of the court, who directed the jury, "that if they find from the evidence produced, that the brig Sea Flower had traded with the insurgents at Port au Prince, in the island of St. Domingo, and had there purchased a cargo of coffee and logwood, and having cleared at the said port, and coming from the same, was captured by a French privateer, duly commissioned as such, within six leagues of the island of St. Heneague, a dependency of St. Domingo, for a breach of said municipal regulations, that in such case, the capture of the Sea Flower was legal, although such capture was made at the distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island, and that the said capture, possession, subsequent condemnation and sale of the said Sea Flower, with her cargo, divested the said cargo out of the plaintiffs, and the property therein became vested in the purchaser."

Harper, for the plaintiffs in error.—The main question in this case is, whether the French tribunal at Guadalupe had jurisdiction of a seizure, under the municipal laws of St. Domingo, of a vessel seized more than two leagues distant from the coast.

This question was decided by this court in this cause when it was here before. In the case of *Rose v. Himely* (4 Cr. 241), this court decided, that the French tribunal had not jurisdiction because the seizure was made more than two leagues distance from the coast; and in this case (*Ibid.* 293), this court decided that the French tribunal had jurisdiction, because it appeared by the statement of facts that the vessel was seized within one league from the coast. So also, the cases of *Palmer & Higgins v. Dutilh*, and *Hargous v. The Brig Ceres* (*Ibid.* 298, in note), were remanded for further proceedings, because it did not appear whether the seizures in those cases were made within two leagues of the coast.

*283] *P. B. Key and Martin*, contra.—A nation has a *right to use all the means necessary to enforce obedience to its municipal regulations and laws. It has a right to enforce its municipal laws of trade, beyond its territorial jurisdiction. This right is exercised both by Great Britain and America, to enforce their respective revenue laws. The only limit to this right is the principle that you do not thereby invade the exclusive rights of other nations. The *arrêts* relative to the trade of St. Domingo, do not

Hudson v. Guestier.

limit the jurisdiction of their tribunals to seizures made within two leagues of the coast.

The French *ordonnances*, referred to in the sentence of condemnation, embrace four distinct descriptions of vessels: 1. Those found at anchor, &c.; 2. Those cleared for ports in possession of the revolters; 3. Those coming out of the interdicted ports, with or without a cargo; and 4. Vessels sailing in the territorial extent of the island, found within two leagues of the coast.

The distance of two leagues expressed in the *ordonnance*, is limited to the last description, and does not apply to either of the three first. It is tantamount to the hovering acts of Great Britain and the United States. Neither the object nor the policy of the law would admit such a construction. If a vessel had been trading with the blacks, she had only to wait for a fair wind, slip out of port, and in half an hour be beyond the line of the jurisdiction.

March 17th, 1810. LIVINGSTON, J.—In this case, when here before, I dissented from the opinion of the court, because I did not think that the condemnation of a French court, at Guadaloupe, of a vessel and cargo lying in the port of *another nation, had changed the property; but this [*284] ground, which was the only one taken by two of the judges in this case, and by three, in that of *Himely v. Rose*, and was principally and almost solely relied on at bar, was overruled by a majority of the court, as will appear by examining those two cases, which were decided the same day. I am not, therefore, in determining this cause, as it now comes up, at liberty to proceed upon it; and such must have been the opinion of Judge CHASE, on the trial of it, who was one of the court who had proceeded on that principle.

Considering it, then, as settled, that the French tribunal had jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say, whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than two leagues from the coast. If the *res* can be proceeded against, when not in the possession or under the control of the court, I am not able to perceive, how it can be material, whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also, that if jurisdiction be at all permitted, where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own state, whether, in the particular case, she had jurisdiction, if any objection be made to it. And although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over the Sea Flower, that she was captured more than two leagues at sea, who can say, that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the

Smith v. Maryland.

owner of the property, *whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way : and even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property.

Believing, therefore, that this property was changed by its condemnation at Guadaloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed.

The other judges (except the Chief Justice) concurred.

MARSHALL, Ch. J., observed, that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in this he was mistaken. The opinion was concurred in by one judge. He was still of opinion, that the construction then given was correct ; he understood the expression *en sortant*, in the *arrêté*, as confining the case of vessels coming out, to vessels taken in the act of coming out. If it included vessels captured on the return-voyage, he should concur in the opinion now delivered. However, the principle of that case (*Rose v. Himely*) is now overruled.

Judgment affirmed.(a)

*286] *SMITH v. The STATE OF MARYLAND, at the instance and for the use of CARROLL and MACCOUBBIN.

Error to state court.—Confiscation.

A writ of error lies to the highest court of a state, in a case where the question is, whether a confiscation under the law of the state was complete, before the treaty of peace with Great Britain.¹

By the confiscating acts of Maryland, the equitable interests of British subjects were confiscated, without office fund, or entry or other act done ; and although such equitable interests were not discovered, until long after the peace.²

ERROR to the Court of Appeals of the state of Maryland, being the highest court of law and equity in that state, which affirmed the decree of the chancellor of Maryland. The facts of the case appear to be correctly stated in the decree of the chancellor, which was as follows :

"The material facts appearing in this case are, that on the 4th of July 1774, the lands mentioned in the bill were conveyed by Anne Ottey, heir-at-law of William Ottey, to William Smith, one of the defendants, and that

(a) Todd, J., stated, that in the case of *Rose v. Himely*, at February term 1808, he concurred in opinion with Judge JOHNSON.

Harper stated, that one of the judges of the court below had doubted whether, when a case is reversed upon a bill of exceptions and remanded, the court below ought to grant a new trial.

MARSHALL, Ch. J.—If it be upon a special verdict, or case agreed, the court above will proceed to give judgment. But when a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below.

¹ *Martin v. Hunter*, 1 Wheat. 804, 859.

² *United States v. Repentigny*, 5 Wall. 213, 268.

Smith v. Maryland.

an act of assembly passed in June 1779, for recording the deed of conveyance, which had not been recorded within the time limited by law. That on the 5th of July 1774, Smith executed a bond of conveyance to Anne Ottey, widow of William Ottey, and that at the time of passing the act of October 1780, c. 45, 'to seize, confiscate, and appropriate all British property within this state,' he held the said lands under the said deed, subject to the terms of the said bond of conveyance, and in trust for the said Anne Ottey, then and now a British subject, and that the lands are now held in the same manner. That on the 27th of April 1801, the complainants, Carroll and Maccubbin, gave information of this property being so held, to the state's agent, and claimed the composition held out by law on the said information. That on the 22d of February 1803, the governor and council agreed to sell the state's right to the said lands to the said Carroll and Maccubbin. That a survey was made and a plat returned, and bond given for the purchase-money, on the 30th of April 1803. The object of the bill is to compel the defendant Smith to produce in this court all deeds, papers and writings respecting the said land, and to convey the *same to the said Carroll and Maccubbin, and for general relief, &c.

"The positions relied on by the complainants in their notes are, that the property so held in trust for a British subject, or in which a British subject had an equitable interest, but no legal estate, was liable to confiscation under the laws of this state, and was confiscated by them; and that there is nothing in any treaty between the United States and Great Britain, to protect the said property, or to prevent its being liable to their claim.

"For the defendants, it is contended, that the 6th article of the treaty of the 3d of September 1783, declaring that there should be no future confiscations made, had the effect of preventing any transfer, by the executive, of property which might have been confiscated, but was only legally, and not actually, transferred from private to public use, or from the possessor to the state; and that such transfer by the executive must be considered as a future confiscation, or setting apart for the public, property, the use of which an individual had, and therefore, contrary to the stipulations of the treaty. And it is also contended, that under the 9th article of the British treaty of the 19th of November 1794 (by which it was agreed, that the British subjects who then held lands in the territories of the United States should continue to hold them according to the nature and tenor of their respective estates and titles therein), this property is protected, being then held by the defendant, Smith, as agent of and for Anne Ottey, a British subject, and therefore, then held by her.

"In a case of this nature, where an important question as to the operation of a treaty arises, it would be satisfactory to the chancellor, to have the opinion of a court of law, or its judges. The late change in the judiciary has, however, rendered the obtaining such an opinion less practicable than it formerly was; and it appears also, that the most material ground taken by the defendants has been already decided on, by the general court, in the case of *Norwood's Lessee v. Owings*.¹

*"A number of points were decided in that case, but the one most applicable to the present question was the determination by the

¹ See 5 Cr. 350, note.

Smith v. Maryland.

court, or the opinion expressed, that the state of Maryland, by their commissioners, was in possession of all British property, within the limits of the state, under and by virtue of the act of confiscation, October 1780, c. 45, and the act of the same session, c. 49, to appoint commissioners, &c. : and the possession of the said land was in the state of Maryland, at the time the said Edward Norwood obtained his escheat warrant, and that no British subject could hold land in the state of Maryland, on the 19th of November 1794, the time when the treaty was entered into between Great Britain and the United States.

"It is not necessary, at this time, to declare any opinion as to the intent and meaning of the 9th article of that treaty, or to ascertain to what part of the territories of the United States it might have applied. It is sufficient to observe, that according to the opinion of the general court, standing as yet unreversed, it could not apply to this state.

"There is nothing in this case to induce the chancellor to determine contrary to that opinion ; and if the holding of the land by Smith for Anne Ottey, was a holding by her, in October 1780, and occasioned its confiscation, it cannot be considered that she held the land in November 1794, so as to be enabled, by the 9th article of the treaty with Great Britain, then made, to continue to hold it, according to the nature and tenor of her estate.

"The words of the 2d section of the act of October 1780, c. 45, are, 'That all property within this state (debts only excepted), belonging to British subjects, shall be seized, and is hereby confiscated to the use of this state,' and under this general expression, it is considered, that land in which the legal title was held by a citizen of this state, in trust for a British subject (as is the case now in question), was included.

*^{289]} "That this was the construction given to the act appears from the subsequent conduct of the legislature and the executive of this state, and particularly by the first section of the act of 1784, c. 81, which directs, that the intendant of the revenue be authorized and required to call on all persons having confiscated British property in their possession, or the title papers thereof, or relating thereto, to discover and deliver up the same ; and if the said intendant has probable and good ground to suspect, that any person holds the same in trust for any British subject, or conceals the same, or any deeds, writings or evidence of the titles to such property, he may and shall direct the attorney-general to file a bill in the high court of chancery, on behalf of this state, for the discovery of such trust or concealed property, and for delivering up such deeds, writings and evidence of title to the same ; thereupon, proceedings shall be had, and decree made, according to the rules of the high court of chancery in such cases.

"And it will be observed, that, by the fifth article of the treaty of 1783, the recommendation to be made for a restitution of property confiscated, extends to all estates, rights and properties.

"If, then, this property was confiscated, and the right to it vested in the state, by the acts of October 1780, c. 45, and c. 49, the chancellor does not perceive how it can be affected by the sixth article of the treaty of 1783, declaring that there should be no future confiscations made. The future acts of confiscation to be restrained by that article were absolute confiscations, and not the dispositions that might be necessary for those which had been made. Such dispositions might have been the subject of consideration, if

Smith v. Maryland.

the recommendations made for a restitution of property confiscated, had been complied with by this state.

"Considering, then, the lands in question to have been *confiscated, and that the right of the state, or those claiming under the state, is not affected by either of the treaties which have been relied on, it remains only to inquire, as to the grounds of the complainants' application to this court, and the nature of the relief to which they may be entitled. The act of 1802, c. 100, under which the complainants allege that the purchase was made, declares, that it shall and may be lawful for any person or persons purchasing as aforesaid any confiscated British property, under the authority of this act, to prosecute any suit or suits, either in law or equity, in the name of the state, for recovery of said property for their use.

"If this property had not been sold, it might have been competent for the state to have proceeded by suit to divest the legal estate from the defendant William Smith; and it seems consonant to equity, and to the provisions of the act just mentioned, that in the present case, it should be vested in the complainants, who were the purchasers from the state."

Then followed the formal part of the decree, that Smith should convey the land to Carroll and Maccubbin. From this decree, Smith appealed to the court of appeals of Maryland, who confirmed the decree; whereupon, he brought his writ of error to this court, under the provisions of the 25th section of the judiciary act of 1789 (1 U. S. Stat. 85), the decision being against the right claimed under the treaty.

Johnson, for the plaintiff in error.—The question in the case is, whether a British subject who, in fact, by her agent and trustee, held land in Maryland, before the revolution, and continued to hold it undisturbed, until the year 1802, is protected by the treaties; or whether our acts of confiscation were so operative as to enable an informer, in a court of equity, to compel the trustee to convey the legal estate to him. *This depends upon the true construction of the acts of assembly of Maryland, and of the treaties with Great Britain. [291]

It is for this court to decide, whether the construction which the Maryland courts have given to their acts of assembly, be consistent with the true construction of those treaties. The 5th and 6th articles of the treaty of peace, of the 3d of September 1783 (8 U. S. Stat. 82-3), relate to this subject, and are both to be taken into view, in order to ascertain what the 6th article means, when it says, "there shall be no future confiscations made."

By the fifth article, it is agreed, that congress shall earnestly recommend the restitution of confiscated property belonging to real British subjects, and also of persons resident in districts in the possession of his majesty's arms, who had not borne arms against the United States. This was contemplated to be done, without payment therefor. But as to the refugees who had borne arms against the United States, congress was to recommend restitution only upon the terms of payment (to any person who might then be in possession) of the price which had been paid for the purchase thereof since confiscation. But if the property had not been sold, even they were not to pay for their estates, although the state might have discovered, seized and possessed them. This was the spirit of reconciliation which was entertained between

Smith v. Maryland.

the parties at that time, and ought not to be forgotten, in construing the treaty. These, however, were cases where the state had actually possessed themselves of the property, and had used or disposed of it. In those cases, the interposition of the state was necessary to give effect to the intention of that part of the treaty. The 5th section, therefore, relates entirely to confiscations actually made and finished, and where the state sovereignties had possessed, and used or disposed of the property. But the cases of inchoate confiscation, where the possession had not been divested, where the party [292] still enjoyed the property, but where the states would, under the *existing laws, have a right to seize and possess themselves of the property, and where some act still remained to be performed, in order to completely vest the title and possession in the state, such cases were reserved for the subject of the 6th article ; which stipulates "that there shall be no future confiscations made ; nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war ; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property ; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued. The cases in the 5th article required some act to be done by the states to restore the property, because the party was out of possession ; but where the party was already in the possession and enjoyment of the property, no act of the states was necessary. It was competent for the treaty to provide for the case ; and to stipulate, as the 6th article does, in effect, that the party shall not be put in a worse situation than he then was in, either as to his person, his liberty, or his property. The treaty did not consider property as confiscated, if any further act was necessary to give the state a complete legal title.

To ascertain the true construction of the 6th article of the treaty, it is necessary to fix the meaning of the term confiscation. 1. What is confiscation ? 2. On what principles, does the right of confiscation depend ?

1. To confiscate, is to transfer property from private to public use. But the public cannot have the use of property not known to exist. The state of Maryland had not the use of this property, before it was discovered, in 1801. It was not, before that time, transferred from private to public use, and consequently, was not confiscated.

*2. The right to confiscate the property of an enemy during war [293] is derived from a state of war, and is called one of the rights of war. The right originates in the principle of self-preservation. It is a means of weakening the enemy, and of strengthening ourselves. 3 Dall. 227 ; Vatt. lib. 3, c. 8, § 138, p. 519 ; Ibid. lib. 3, c. 9, § 161, p. 541. The right to confiscate ceases with the principle upon which it is founded. In time of peace, we are in no danger, and therefore, self-preservation will not then justify confiscation. We have no enemy to disable, and therefore, no right to strengthen ourselves at the expense of another, although he had been an enemy.

But we are told, that the state is not now confiscating the property of him who was our enemy. That was done during the war. We are not now depriving him of the possession, and excluding him from the use of the land. All this was done during the war. And this is said in the same breath

Smith v. Maryland.

which admits that the party has remained in the possession, use and enjoyment of the land, until this moment, and that the property was not discovered to have been the property of an enemy, until twenty years after the end of the war. The right to confiscate the goods of an enemy is merely the belligerent right of capture. If the property be not taken during the war, it can never be seized afterwards. This property, while it remained undiscovered, could neither weaken our enemy, nor strengthen ourselves.

It would be difficult to establish the position, by reason, or by the law of nations, that you can ever be placed in a situation where, although it be unlawful to pass an act declaring you will seize and confiscate enemies' property, yet that you may, because you declared you had seized it, when in fact you had not deprived him of the possession and use of it. As to him, the effect is the same ; and it is equally a just cause of hostility, whether in fact you take from him what he in fact held, without a previous declaration *of your intention to do so, or first make the declaration, and then do it. In order to evade the positive prohibition of the treaty, you set [294 up a mere legal fiction, in opposition to the truth of the case, and in violation of the spirit as well as the letter of a solemn national compact.

This construction deprives the words of all meaning and effect. It was absurd, to make provisions against future confiscations, if everything was already confiscated. No construction of a treaty is to be admitted, which leads to an absurdity, or renders the treaty null and without effect. Vattel 380-82.

It is contended, that the first provision in the 6th article can never apply to Maryland, because there the confiscations were complete, whether the property were discovered or not, and whether the state by its agents had taken the possession or not ; the law having vested the title and possession. Let it be conceded, that the law, of itself, had all these effects, yet the treaty, if fairly construed, annulled the future operations of the law, and prevented the state, or its assigns, from making the confiscation more complete, either by taking actual possession, or compelling the trustees to convey the legal estate.

We contend, that the provision that no future confiscations shall be made, protects all property in fact held by British or American subjects at the time of the treaty, and prevents the laws of confiscation from having the least operation in respect to such property ; or, at any rate, prevents the courts of justice from depriving the holder of the possession, and from forcing his trustee to convey, and from doing any other act to carry into effect an incomplete confiscation. Acts done under a law, during its existence, cannot be affected by the repeal of the law. But if a law authorizes an act to be done, but before the act be done, the law be repealed, there is no authority to do the act. So, if the act be done in part, and be incomplete at the time of the repeal, nothing further can be done. The treaty was a repeal of all the confiscation laws, so *far as to suspend their confiscating effects ; and no court of judicature could carry them into execution. [295

The stipulation "that there should be no future confiscations made," was not intended to prevent the passing of future laws of confiscation. There could be no right to pass such laws, during peace. Such laws would have been a most flagrant violation of the law of nations ; and would have been a good cause of war.

Smith v. Maryland.

If it be said, that the stipulation was intended to apply only to those states where the confiscation laws were incomplete, we answer, that the confiscation was incomplete, even in the case now before the court. The circumstance of an application to a court of chancery to complete the title of the state, is conclusive evidence that the title was not complete ; and if the title was not completely in the state, the confiscation was not complete.

In those states where an inquest of office was necessary to gain a seisin by the state, such a proceeding could not be had, after the treaty ; this point has been admitted by all the states. No solid reason can be given, why the treaty should not equally bar a proceeding in equity, to obtain the same object.

No reason can be given, why one of the states, more than another, should be enabled to derive a continuing revenue from the discovery of property, after the peace, which had belonged to an enemy during the war.

If it be said, that the act of confiscation vested the equitable title in the state, and that that equitable title is transferred to the complainants, Carroll and Maccubbin, and that as, in equity, what ought to have been done, is presumed to have been done, and therefore, a conveyance is to be made now, as if it had been made then : We admit, that this is true in ordinary cases of equity ; but this is not an ordinary case of equity ; there is no equity in compelling a forfeiture accruing **jure belli*. It is a mere exercise of superior power, or, at most, a case of the strictest law. It is not the province of a court of equity to enforce penalties and forfeitures (especially those growing out of a state of war), but to relieve against them. No man will contend, that a British subject was bound in law, conscience or morality, to make a disclosure of his property to his enemy, for the purpose of being deprived of it. The same right of war which justified us in confiscating the property of British subjects, justified them in concealing it.

The general purview of the 6th article of the treaty shows that the intention of the contracting parties was, that things should remain as they then were ; no future confiscations were to be made ; that is, no property was to be transferred from private to public use ; no person then in possession was to be turned out, on account of the part he took in the war ; no prosecution was to be commenced ; no person was to suffer any future loss or damage, either in his person, liberty or property on that account. To deprive a man of his property, to turn him out of a possession, which he had enjoyed until that moment, to deprive him of his daily bread, is to make him suffer a loss and damage on account of the part he took in the war, and is, therefore, a direct violation of the treaty.

The right of confiscation is, in substance, the same as the right of capture ; it depends upon the same principle, the right of self-preservation. If the property be taken *flagrante bello*, it becomes the property of the captor. But if it be not taken, during the war, he cannot afterwards claim and take it, because he might have taken it during the war, if he had known where it was. He cannot make it his own, by a mere declaration that it is his. The right to take can only be exercised during the war. If there be only a declaration during the war, it does not change the property. At the cessation of hostilities, the right of capture ceases. The state of Maryland

Smith v. Maryland.

cannot say, I am not now taking your property. I only take my own; and it is my own, because I declared it to be so, during the war.

*With much more truth might Great Britain, when we charge her with a violation of the 7th article of the treaty, by carrying away the negroes, and other property of Americans, say, I did not take away the property of the Americans; I only took my own. It was mine, not by a mere declaration that it was mine, but by an actual seizure of it, during the war, and according to the rights of war. But this construction of the 7th article is not admissible, because it would defeat the whole object and intent of that article. So, we say, the construction given by the courts of Maryland, to the term "confiscations," in the 6th article, is not admissible, because it defeats the whole object and intent of that provision.

The words of the act of October 1780, c. 45, entitled "an act to seize, confiscate and appropriate all British property within this state," are these: "Be it enacted," &c., "that all property within this state, debts only excepted, belonging to British subjects, *shall* be seized, and is hereby confiscated to the use of the state."

By the act of the same session, c. 49, entitled "an act to appoint commissioners to preserve confiscated British property," it is enacted, "William Paca, Uriah Forest and Clement Hollyday, esquires, or any two of them, shall be, and are hereby appointed commissioners, for the purpose of preserving all British property seized and confiscated by the act of the present session to seize, confiscate and appropriate all British property within this state; and that the said commissioners shall be, and are hereby declared to be in the full and actual seisin and possession of all British property seized and confiscated by the said act, without any office found, entry or other act to be done. And the said commissioners shall, and may, as soon as may be, appoint proper persons, in all cases that they may think necessary, to enter into, and take possession of any part of the said property, and to preserve and keep the *same from waste and destruction, or to occupy and employ the same, for the benefit of the public, and to inventory the same, or any other of the said property which the said commissioners may not think proper or necessary to put into the keeping of any person as aforesaid; and the said commissioners shall return to the next general assembly a list or account of all such British property by them discovered, to whom the same belonged, the persons, if any, to whose keeping they committed the same, and the sums to which the same shall be valued in the next valuation of property; and the inventory aforesaid shall also be returned to the general assembly, with the list or account aforesaid; but in case any person shall be in possession of any of the said property, and claim the same, such property shall not be taken out of his possession, if he gives good and sufficient security, in double the value thereof, that the same, if movable, shall be produced, when called for by the commissioners, not any way damaged or injured, or, if real, that no waste or destruction shall be committed thereon, but that the same shall be kept and preserved in as good order and repair as the same may then be in, until the title thereto shall be determined."

By the 4th section of the same act, it is enacted, "that the said commissioners are also hereby declared to be in the full and actual seisin and possession of all property, within this state, which belonged to any person out-

Smith v. Maryland.

lawed for treason; and may appoint proper persons to take care of and preserve the same from waste or destruction, and inventory, and return the same to the general assembly, at the *next* session, in the same manner as if the same was confiscated British property, to the end, that proper measures may be taken for the disposition thereof, in the manner most advantageous for the public, and the purpose to which the same is appropriated."

These acts clearly contemplate an actual seizure of the property, during the existence of the war. The title of the first act is, "to seize, confiscate and appropriate;" and the enacting clause declares, that the property *²⁹⁹" shall be seized." The second act declares the commissioners to be in the full and actual seisin and possession of all British property, seized and confiscated by the former act. It also authorizes the commissioners to appoint other persons to enter and take possession. It directs an account of the property discovered to be returned to the *next* general assembly, and it provides, that if the party in possession claim title, he shall not be turned out of possession, until the question of title be decided.

The act of the same session, c. 51, § 6, speaks of certain manors and lands, "which are seized and confiscated as British property, in consequence of the said act." And the preamble of the 8th section of the act of November 1802, c. 100, § 8, under which Carroll and Maccubbin claim a right to apply to a court of equity in the name of the state, speaks of the discoverers of property liable to confiscation, in the following terms : "Whereas, many persons have made discoveries of British property, confiscated property, or property liable to confiscation, to the governor and council, the late intendant and late agents of the state, and have made application to purchase the same upon the terms held out by law to the discoverers : and whereas, there is no person invested with authority to estimate the value, or fix a reasonable price for the said property, and to compound with the person or persons making such discovery, or with the person or persons applying to purchase the same : Be it enacted, that the governor and council be and they are hereby empowered to compound with all persons who have heretofore made discovery of British property, confiscated property, or property liable to confiscation, either to the governor and council, the late intendant, or any of the state agents, and to allow not exceeding one-third of the value of such property to any person or persons having made such discovery, and who shall make application to the governor and council, on or before the first day of May next, to compound for and purchase the same, and the said governor and council are hereby authorized to dispose of such property to *³⁰⁰] such applicants, and take bonds, with good and sufficient *security, to be approved of by the treasurer of the western shore, for the purchase-money, bearing interest payable to the state at the periods that may be agreed on."

The 9th section provides, that if the discoverer "shall not make known to the governor and council the title of the state to the property aforesaid," before the 1st of May, then next, &c., the governor and council are to sell and dispose of the "state's right" to the property, &c. And by the 10th section it is enacted, "that it shall and may be lawful for any person or persons purchasing as aforesaid any confiscated British property, under the authority of this act, to prosecute any suit or suits, either in law or equity, in the name of the state, for the recovery of said property for their use :

Smith v. Maryland.

provided, that the said state shall not be liable to pay any costs incurred in prosecution of said suits ;" "and provided also, that in all such sales, so to be made by the governor and council, it shall be made known, and shall be a condition thereof, that they only sell the right of the state thereto, and that the state doth not guaranty the title to the same, or any part thereof, but that the purchase must be in all respects at the risk of the purchaser."

This act is clearly a legislative construction of the former acts respecting confiscation, and it takes a distinction between British property, and confiscated property, and property liable to confiscation ; it supposes the existence of British property not confiscated ; which could be no other than property which was once liable to confiscation, but which had never been actually discovered and seized. But this land was, at the time of the British treaty of 1794, holden by a British subject, through the medium of a trustee, so that it is a case within the benefit of the 9th article of that treaty.

As to the question of jurisdiction of the courts of the United States, the real question in the case is, whether the property was, before the treaty of peace, *actually confiscated, within the meaning of that treaty. It is [*301 a question upon the construction of the treaty only, and the judgment below has been against the right claimed under that treaty, and is, therefore, clearly within the letter of the 25th section of the judiciary act of 1789.

Ridgeley, contrà.—The act of Maryland, of October 1780, c. 45, actually and absolutely confiscates the property, whether found or not. And the act of the same session, c. 49, declares the commissioners to be in the actual seisin and possession of the property, "without any office found, entry or other act to be done."

The courts of the United States have not jurisdiction in the case, because the only question is, whether, by the laws of Maryland, the property was completely confiscated, before the treaty of peace. If it was, the treaty does not apply ; if it was not, the treaty protects it. The laws of Maryland are to be construed by this court as they are construed in Maryland ; and the judgment in this very suit is conclusive evidence of the construction given to their laws by the courts of that state. The acts of confiscation make no distinction between legal and equitable estates.

Harper, on the same side.—This case presents two questions. The first, upon the jurisdiction ; the second, upon the construction of the act of Maryland.

1. This is not a case depending upon the construction of the treaties, but upon the laws of Maryland. If, by those laws, the property was not confiscated before the treaty of peace, we admit, that it cannot now be confiscated. If it was confiscated, the treaty does not apply. The general understanding in Maryland, and the uniform decisions of their courts have been, *that the act of assembly completely confiscated all British property [*302 within that state, without office found, or entry or seizure ; so that, at the peace, there could not be any future confiscations, because, no British subject could then hold lands in Maryland. This is an answer to both treaties. The courts of Maryland are the exclusive judges of the construction of the laws of that state.

If this court can take cognisance of the cause, the only question which

Smith v. Maryland.

they can decide is that which arises upon the construction of the treaty. The question of construction of the acts of Maryland is not open to this court.

Jones, in reply.—The right of Mrs. Ottey was not of such a nature as to be within the description of the act of assembly; and as it was a highly rigorous and penal law, creating a forfeiture of lands, it ought to be strictly construed. To include the case of a *cestui que trust* would require a special description. The only term used in the act is “property,” which, in its general and most obvious signification, means the legal title and possession of the thing itself. By the common law, no trust estate or use was forfeitable for treason; and an alien might hold and enjoy the profits of land through the medium of a trustee. 4 Com. Dig. 231; 2 Co. 513; 2 Inst. 18, 19, 21. And this principle respecting forfeitures applies to confiscations. 3 Inst. 227.

By the act of Maryland itself, no property was confiscated, until it was first seized, and it could not be seized, until it was found. But the question is not, whether it was a confiscation of the kind contemplated by the act of Maryland, but whether it was a confiscation of the kind contemplated by the treaty. Treaties, especially those which put an end to the miseries of war, ought to be construed with liberality, and according to the spirit of the contract, and the intention of the parties. The confiscation contemplated by the acts of Maryland, if the construction be correct which has *303] *been given to them by their courts, was not an actual confiscation *de facto*, but a confiscation in contemplation of law. So far as it could be supposed to apply to property not discovered nor seized, it was a mere fiction of law. The contracting parties to the treaty could only have intended actual confiscations *de facto*; cases where, in truth, the property had already been seized and converted to public use. The spirit of the treaty is clearly discovered, from the whole tenor of the instrument, to be, that nothing which was not already actually converted to the public use, should be taken from the individual, on account of the part taken in the war. A future seizure of the property held by the individual; a future conversion of it to public use, was, therefore, a future confiscation, within the letter and the spirit of the prohibition contained in the 6th article of the treaty. The negotiators of that treaty must be presumed to have been perfectly acquainted with the laws of England relating to treason, and forfeitures of every kind. It was known, that even by the high prerogative of the crown, the king gained no title, until actual seizure. The writ of seizure was a necessary consequence of an office found. 2 Inst. 206, 207, 573, 689. Until entry or seizure, there was only a possibility of an estate, which was to be gained by entry. The seizure or entry is the commencement of the title. Co. Litt. 118 a; *Roberts v. Witherhead*, 12 Mod. 92. This seems also to have been the opinion of the legislature of Maryland, when they declared that the property should be seized and confiscated; and when they passed the subsequent acts of 1797, c. 119, and 1802, c. 100.

The right of Mrs. Ottey is protected by the clauses of the 6th article of the treaty of peace, prohibiting future confiscations and future loss on account of the part taken in the war; and by the 9th article of the treaty of 1794, in favor of those who then held lands in the United States. Mrs. Ottey then

Smith v. Maryland.

held the land ; if not at law, yet she did in equity ; and as this is a suit in equity, the court will consider her as within the equity of the treaty.

*March 16th, 1810. WASHINGTON, J.,(a) delivered the opinion [*304 of the court, as follows :—This cause comes before the court upon a writ of error to the court of appeals of the state of Maryland ; and the first question is, has the supreme court of the United States appellate jurisdiction in a case like the present ? It is contended, by the defendants in error, that the question involved in the cause turns exclusively upon the construction of the confiscation laws of the state of Maryland, passed prior to the treaty of peace, and that no question, relative to the construction of that treaty, did or could occur. That the only point in dispute was, whether the confiscation of the lands in controversy was complete, or not, by the mere operation of those laws, without any further act to be done. If the former, it was admitted, on the one side, that the right of Ann Ottey, the British subject, was not saved or protected by the treaty ; if the latter, then it was agreed, on the other, that it was protected, and that no proceedings subsequent to the treaty, in order to perfect the confiscation, could be supported.¹

This argument proves nothing more than that the whole difficulty in this case depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious, so soon as that construction is settled. But still the question recurs, is this a case where the construction of any clause in a treaty was drawn in question in the state court, and where the decision was against the title set up under such treaty ? The only title asserted by the defendants in error, to the land in dispute, is founded upon an alleged confiscation of them by the state of Maryland, and a conveyance to them of the right thus acquired by the state. The title set up by the *plaintiffs in error, for Ann Ottey, and the only one which could possibly resist that claimed by the grantees of the state, is under the [*305 treaty of peace ; the 6th article of which protects her rights, provided the confiscation, by the laws of the state, was not complete, prior to the treaty. The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the 6th article of that treaty ; and in order to arrive at a correct result in the decision of that point, it became necessary, in the state court, and will be necessary in this, to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made, or not ? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty ; and it is perfectly immaterial to the point of jurisdiction, that the first part of the way is the most difficult to explore. Although the defendant's counsel admit, and the supreme court of the state may, in this particular case, have decided, that, where the confiscation is not complete, before the treaty, the estate attempted to be confiscated is protected by the treaty, still, if, according to the true construction of the state laws, this

(a) The Chief Justice did not sit in this cause. The judges present were WASHINGTON, JOHNSON, LIVINGSTON and Todd.

¹ Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 492.

Smith v. Maryland.

court should be of opinion, that the acts of confiscation left something to be done, necessary to the perfection of the title claimed under them, which was not done, at the time the treaty was made, we must say that, in this case, the construction of the treaty was drawn in question, and that the decision of the state court was against the right set up, under the treaty, by one of the parties.

This leads to the consideration of the merits of the cause, which depend upon the question before stated, viz., whether the confiscation of the lands in question was so far complete, by the laws referred to, that the title and estate of Ann Ottey was divested out of her and vested in the state, prior to the treaty of peace? This must depend upon the true construction of the acts passed in the year 1780, chapters 45 and 49, as it is not pretended, that any proceedings were instituted in the nature of an office, to complete the *306] forfeiture [of these lands, upon the ground of alienage or otherwise.

The first law declares, generally, that "all property within this state, belonging to British subjects, debts only excepted, shall be seized, and is hereby confiscated to the use of this state." Anticipating, as it would seem, that questions might arise, after peace, in respect to lands not proceeded against according to the rules of the common law, the legislature, in the same session, passed a second law, appointing certain commissioners, by name, to preserve all British property seized and confiscated by the former law, and declaring the said commissioners to be in the full and actual seisin and possession of all British property seized and confiscated by the said act, without any office found, entry or other act to be done, with power to the said commissioners, to appoint fit persons to enter and take possession of said property, for the purpose of its preservation.

It would seem difficult to draught a law more completely operative to divest the whole estate of the former owner, and to vest it in the state. The arguments against giving to these laws such an effect are, that the expressions used in these laws do not import a confiscation of merely equitable estates, and that no estates were intended to be confiscated, but such as were discovered and seized into the hands of the state, prior to the treaty.

It is true, that the word property, used in both laws, means the thing itself, intended to be affected by them, whether it were land or personal property; but then it is equally clear, that the thing itself, whatever it might be, ceased, by the operation of these laws, to belong to the British subject, and became vested in the commissioners, for the use of the state. The *cestui que trust*, though not in possession of the property, was, nevertheless, the real owner of it, and, if the property or thing itself had come into the actual possession of the commissioners, who would have held it to the use of the state, it would seem difficult to maintain the position, that a *scintilla* of interest *or estate remained, for an instant afterwards, in the former *307] owner.

But no act of the commissioners was necessary in order to obtain seisin of the land, to support the use thus transferred from Ann Ottey to the state. No seizure was necessary. The second law considers that all property belonging to British subjects was, by the mere operation of the first law, seized and confiscated; and declares that the commissioners were then in the full and actual seisin and possession of the property, so seized and con-

Durousseau v. United States.

fiscated by the first law, though no entry or other act had or should be made or done.

Being thus in the actual seisin, under the second law, which seisin had been declared, by the first law, to inure to the use of the state, it is perfectly immaterial, at what time the right of the state to the lands now in controversy, thus completed prior to the treaty, was discovered, or at what time actual seisin and possession was obtained. From the time that the second law came into operation, the possession of the trustees of Ann Ottey either ceased to be legal, or it was to be considered as the possession of the commissioners, to the new use which had been declared by law. The present suit is between persons claiming under the state, and others who either held the lands wrongfully, or for the use of the state, and it is, in no respect, necessary to the perfection of the change of property produced by the laws of confiscation.

Judgment affirmed, with costs.

DUROUSSEAU and others v. UNITED STATES.

Appellate jurisdiction.—Embargo-bond.

The appellate powers of the supreme court of the United States, are given by the constitution; but they are limited and regulated by the judiciary act, and other acts passed by congress on the subject.¹

This court has appellate jurisdiction of decisions in the district courts of Kentucky, Ohio, Tennessee and Orleans, even in causes properly cognisable by the district courts of the United States.

To an action of debt for the penalty of an embargo-bond, it is a good plea, under the act of congress of the 12th of March 1808, § 3, that the party was prevented from relanding the goods in the United States, by unavoidable accident.

United States v. Hall, ante, p. 171, re-affirmed.

ERROR to the District Court of the United States for the district of Orleans.

This was a suit brought by the United States against *Durousseau [^{*308} and others, upon a bond, given in pursuance of the act of congress of December 22d, 1807, usually called the embargo act. (2 U. S. Stat. 451.) The bond bore date the 16th of May 1808, and the condition was, that the goods therein mentioned should be "relanded in the United States, at the port of Charleston, or at some other port of the United States, the dangers of the seas excepted."

The proceedings in the court below were according to the forms of the civil law, by petition or libel and answer. The libel was in the nature of an action of debt for the penalty of the bond, and the answer was in the nature of a special plea, stating facts which were supposed to be sufficient evidence that the defendants were prevented, by the dangers of the seas, from relanding the goods in the United States.

The answer or plea stated, that the vessel sailed from New Orleans with intent to proceed to the port of Charleston, and that in the due prosecution

¹ *Ex parte Vallandigham*, 1 Wm. 251; *Daniels v. Railroad Co.*, 3 Id. 254; *Ex parte McCardle*, 7 Id. 506; *Merrill v. Petty*, 16 Id. 346; *Murdock v. Memphis*, 20 Id. 620; *United States v. Young*, 94 U. S. 259; *Railroad Co. v. Grant*, 98 Id. 401.

Durousseau v. United States.

of her voyage from New Orleans to Charleston, she was, "on the 26th of May 1808, and on divers days from the said 26th of May until the 1st of June then next following, upon the high seas, by unavoidable accident, by force of the winds and waves, so much injured and endamaged, that upon the said 1st day of June, for the preservation of the said vessel and cargo, and the lives of her crew and passengers, it was found necessary to put into the port of Havana, to refit the said vessel for her voyage aforesaid ; and that the persons administering the government at the said port of Havana, by force of arms, and against the will and consent of these defendants, and of the captain and supercargo of the said vessel, and all other persons having the charge and direction of the said vessel or cargo whatever, did detain the said vessel and cargo at the said port of Havana, and by superior force, did prevent the said vessel, with her cargo, from pursuing her said voyage to the port of Charleston aforesaid, or from going to any other port of the United States, and landing the said cargo therein, pursuant to the condition of the said bond, and did also, by force so as aforesaid, prevent, and have *309] *always hitherto prevented, the said cargo, or any part thereof, from being sent in any other manner to the said United States and landed therein, pursuant to the condition of the said bond ; and these defendants aver, that the damages and injuries aforesaid sustained by the said vessel were unavoidable, and by force of the winds and waves ; and that by reason of the detention, and continuation thereof, as aforesaid, by superior force as aforesaid, they could not, at any time heretofore, nor can they yet, land the said goods, wares and merchandises in the said United States, pursuant to the condition of the said bond in the said petition set forth ; by reason whereof, and also by force of the statutes in such case made and provided, these defendants are, as they are advised, discharged from the payment of the said sum of money in the said bond or obligation mentioned, or any part thereof ; these defendants, therefore, pray, that a jury may be impanelled to inquire of the facts aforesaid, should they be denied by the United States, and that these defendants may be hence dismissed with their reasonable costs and damages in this behalf most wrongfully expended," &c.

To this answer, the attorney for the United States filed a general demurrer, and the court below, without argument, rendered judgment for the United States ; whereupon, the defendants sued out their writ of error.

Rodney, Attorney-General, and Jones, for the United States, contended, that this court has no jurisdiction, because there can be no writ of error to, or appeal from, the decisions of the district court of Orleans.

By the act of congress passed March 26th, 1804, entitled an act erecting Louisiana into two territories, and providing for the temporary government thereof (2 U. S. Stat. 285, § 8), it is enacted, that "there shall be established in the said territory a district court, to consist of one judge, who shall reside therein, and be called the district judge, and who shall hold, in the city of Orleans, four sessions annually ;" "he shall in all things have the same jurisdiction and powers, which are by law *given to, or may be exercised *310] by, the judge of Kentucky district." By the judiciary act of September 24th, 1789 (1 U. S. Stat. 77, § 10), the district court, besides the ordinary jurisdiction of a district court, has "jurisdiction of all other causes except of appeals and writs of error, hereinafter made cognisable in a circuit

Durousseau v. United States.

court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the supreme court, in the same causes, as from a circuit to the supreme court, and under the same regulations." By the 9th section of the same act, the district courts have "exclusive original cognisance of all suits for penalties and forfeitures incurred under the laws of the United States."

Hence, it appears, that writs of error will lie to the Kentucky district court in those causes only in which it acts in the capacity of a circuit court. The word "therein," means in causes other than those of which the district courts generally had cognisance under the 9th section of the act.

This court, in the cases of *Clarke v. Bazadone*, 1 Cr. 212, and *Bollman and Swartwout*, 4 Ibid. 75, disclaimed any appellate jurisdiction not expressly given by law; and by a late act (2 U. S. Stat. 354, 489), extending jurisdiction in certain cases to state judges and state courts, the jurisdiction is given without appeal; which shows that congress are not anxious that there should be an appeal from all the courts to which they have given jurisdiction. There is no appeal from the judge of the district of Orleans, in cases where he exercises only the district court jurisdiction. In Kentucky, there was no circuit court. The district judge, although he exercised the powers and jurisdiction of a circuit court, yet he did not hold a circuit court. His court was merely a district court. The courts of the United States can exercise no jurisdiction not expressly given by statute. *3 Dall. 337. Although this suit was upon a bond, yet it was in fact [*311 a suit for a penalty or forfeiture, like the case of the auctioneer's bond in 2 Anst. 586, 587. This is as much a penalty as if it had been merely declared by the statute, without having been put into the form of a bond.

E. Livingston, contrâ.—This court has jurisdiction, in consequence of its being the supreme court, and the other an inferior court. The terms supreme and inferior are correlative, and imply a power of revision in the superior court.

The judiciary act of 1789 gives a writ of error from the supreme court to the district court of Kentucky, in all cases where a writ of error would lie to a district court from a circuit court, as well as in those cases where a writ of error lies generally from the supreme court to a circuit court. The word "therein," means in that court, and not those cases only in which that court exercises the jurisdiction of a circuit court.

The act of congress gives the Orleans judge the same jurisdiction and powers as are given to the Kentucky judge. If it had been intended to give him the same jurisdiction, without limiting his power by the right of appeal, congress would not have used the word powers. The same powers, means no greater powers; but if the Kentucky judge had limited powers, and the Orleans judge has unlimited powers, the powers cannot be the same.

C. Lee, on the same side, cited the case of *Morgan v. Callender*, 4 Cr. 370, in which this court decided, that it has jurisdiction in cases of appeal from the district court of Orleans. He also suggested the inconvenience which would result from having a revenue court in Orleans, not subject to the control of the supreme court; and from a difference of construction in the

Durousseau v. United States.

laws respecting *trade, commerce and revenue in different parts of the territories of the United States.

Jones, in reply, observed, that the inconvenience arising from the want, of uniformity of decision already exists with respect to all cases under \$2000 value, in which there can be no appeal or writ of error.

March 15th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, upon the question of jurisdiction, as follows :—This is the first of several writs of error to sundry judgments rendered by the court of the United States for the territory of Orleans. The attorney-general having moved to dismiss them, because no writ of error lies from this court to that in any case, or, if in any case, not in such a case as this ; the jurisdiction of this court becomes the first subject for consideration.

The act erecting Louisiana into two territories establishes a district court in the territory of Orleans, consisting of one judge, who "shall in all things, have and exercise the same jurisdiction and powers which are, by law, given to, or may be exercised by, the judge of Kentucky district."

On the part of the United States, it is contended, that this description of the jurisdiction of the court of New Orleans does not imply a power of revision in this court, similar to that which might have been exercised over the judgments of the district court of Kentucky ; or, if it does, that a writ of error could not have been sustained to a judgment rendered by the district court of Kentucky, in such a case as this.

On the part of the plaintiffs, it is contended, that this court possesses a constitutional power to revise and correct the judgments of inferior courts ; [313] or, if not so, that such a power is implied in the act by which the *court of Orleans is created, taken in connection with the judicial act ; and that a writ of error would lie to a judgment rendered by the court for the district of Kentucky, in such a case as this.

Every question originating in the constitution of the United States claims, and will receive, the most serious consideration of this court. The third article of that instrument commences with organizing the judicial department. It consists of one supreme court, and of such inferior courts as congress shall, from time to time, ordain and establish. In these courts, is vested the judicial power of the United States. The first clause of the second section enumerates the cases to which that power shall extend. The second clause of the same section distributes the powers previously described. In some few cases, the supreme court possesses original jurisdiction. The constitution then proceeds thus : "In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

It is contended, that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress ; and that if the court had been created, without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever. The force of this argument is perceived and admitted. Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it

Dourousseau v. United States.

must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution ; *and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. [*314]

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases ; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. It is upon this principle, that the court implies a legislative exception from its constitutional appellate power, in the legislative affirmative description of those powers.

Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of \$2000. There is no express declaration that it will not lie, where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction, all cases decided in the circuits, where the matter in controversy is of less value, and implies negative words. This restriction, however, being implied by the court, *and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made, for the purpose of defeating the intent of the legislature. [*315]

Having made these observations on the constitution, the court will proceed to consider the acts on which its jurisdiction, in the present case, depends ; and, first, to inquire, whether it could take cognisance of this case, had the judgment been rendered by the district court of Kentucky ?

The ninth section of the judicial act describes the jurisdiction of the district courts. The tenth section declares that the district court of Kentucky, "besides the jurisdiction aforesaid," shall exercise jurisdiction over all other causes, except appeals and writs of error, which are made cognisable in a circuit court, and shall proceed therein in the same manner as a circuit court :" "and writs of error and appeals shall lie from decisions therein, to the supreme court, in the same causes as from a circuit court to the supreme court, and under the same regulations."

It is contended, that this suit, which is an action on a bond conditioned to be void on the relanding of goods within the United States, is one of which the district courts have exclusive jurisdiction, and that a writ of error would not lie to a judgment given in such a case. This court does not concur with

Durousseau v. United States.

the attorney-general in the opinion that a circuit court has no original jurisdiction in a case of this description. But it is unnecessary to say anything on this point, because it is deemed clear, that a writ of error is given in the case, however this question might be decided.

It would be difficult to conceive an intention in the legislature to discriminate between judgments rendered by the district court of Kentucky, while exercising the powers of a district court, and those rendered by the same court, while exercising circuit powers, when it is *demonstrated, [316] that the legislature makes no distinction in the cases from their nature and character. Causes of which the district courts have exclusive original jurisdiction are carried into the circuit courts, and then become the objects of the appellate jurisdiction of this court. It would be strange, if, in a case where the powers of the two courts are united in one court, from whose judgments an appeal lies, causes, of which the district courts have exclusive original jurisdiction, should be excepted from the operation of the appellate power. It would require plain words to establish this construction.

But the court is of opinion, that the words import no such meaning. The construction given by the attorney-general to the word "therein," as used in the last instance, in the clause of the tenth section, which has been cited, is too restricted. If, by force of this word, appeals were given only in those causes in which the district court acted as a circuit court, exercising its original jurisdiction, the legislature would not have added the words, "in the same causes as from a circuit court." This addition, if not an absolute repetition, could only serve to create doubt, where no doubt would otherwise exist. The plain meaning of these words is, that wherever the district court decides a cause which, if decided in a circuit court, either in an original suit, or on an appeal, would be subject to a writ of error from the supreme court, the judgment of the district court shall, in like manner, be subject to a writ of error.

This construction is, if possible, rendered still more obvious, by the subsequent part of the same section, which describes the jurisdiction of the district court of Maine in the same terms. Apply the restricted interpretation to the word, "therein," in that instance, and the circuit court of Massachusetts would possess jurisdiction over causes in which the district court of Maine acted as a circuit court; and not over those in which it acted as a district court; a construction which is certainly not to be tolerated. [317] Had this judgment been rendered by the district court of Kentucky, the jurisdiction of this court would have been perfectly clear.

The remaining question admits of more doubt. It is said, that the words used in the law creating the court of Orleans, describe the jurisdiction and powers of that court, not of this, and that they give no express jurisdiction to this court. Hence, it is inferred, with considerable strength of reasoning, that no jurisdiction exists. If the question depended singly upon the reference made in the law, creating the court for the territory of Orleans, to the court of Kentucky, the correctness of this reasoning would perhaps be conceded. It would be found difficult to maintain the proposition, that investing the judge of the territory of Orleans with the same jurisdiction and powers which were exercised by the judge of Kentucky, imposed upon that jurisdiction the same restrictions arising from the power of a superior court, as were imposed on the court of Kentucky.

Durousseau v. United States.

But the question does not depend singly on this reference; it is influenced by other very essential considerations. Previous to the extension of the circuit system to the western states, district courts were erected in the states of Tennessee and Ohio, and their powers were described in the same terms with those which describe the powers of the court of Orleans. The same reference is made to the district court of Kentucky. Under these laws, this court has taken jurisdiction of a cause brought by writ of error from Tennessee. It is true, the question was not moved, and consequently, still remains open. But can it be conceived to have been the intention of the legislature, to except from the appellate jurisdiction of the supreme court, all the causes decided in the western country, except those decided in Kentucky? Can such an intention *be thought possible? Ought it [*318 to be inferred from ambiguous phrases?

The constitution here becomes all important. The constitution and the laws are to be construed together. It is to be recollect, that the appellate powers of the supreme court are defined in the constitution, subject to such exceptions as congress may make. Congress has not expressly made any exceptions; but they are implied from the intent manifested by the affirmative description of its powers. It would be repugnant to every principle of sound construction, to imply an exception against the intent. This question does not rest on the same principles as if there had been an express exception to the jurisdiction of this court, and its power, in this case, was to be implied from the intent of the legislature. The exception is to be implied from the intent, and there is, consequently, a much more liberal operation to be given to the words by which the courts of the western country have been created.

It is believed to be the true intent of the legislature, to place those courts precisely on the footing of the court of Kentucky, in every respect, and to subject their judgments, in the same manner, to the revision of the supreme court. Otherwise, the court of Orleans would, in fact, be a supreme court. It would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an inferior court.

The question of jurisdiction being decided, it was stated by the counsel, that the seven following cases on the docket, viz., the cases of *Bera* and others, *Connelly* and others, *Castries* and others, *Gibbs* and others, *Childs* and others, *Clayand* and others, and *Keene* and others, against the United States, all from New Orleans, stood upon the same pleas of unavoidable accident; excepting that in the cases of *Bera* and others, and *Connelly* and others, the accident was capture by the British, and prevention by superior force from relanding the goods *in the United States. The bond in [*319 *Bera's* case was dated the 21st of March 1808. The condition was the same as in the case of Durousseau.

P. B. Key, E. Livingston, C. Lee and *R. G. Harper*, for the plaintiffs in error.—These cases are all within the benefit of the act of congress passed the 12th of March 1808, § 3 (2 U. S. Stat. 474), which enacts, “that in every case where a bond hath been or shall be given to the United States, under this act, or under the act entitled ‘an act laying an embargo on all ships and vessels in the ports and harbors of the United States,’ or under the act supplementary to the last-mentioned act, with condition that certain goods,

Durousseau v. United States.

wares and merchandise, or the cargo of a vessel, shall be relanded in some port of the United States ; the party or parties to such bond shall, within four months after the date of the same, produce to the collector of the port from which the vessel had been cleared with such goods, wares, merchandise or cargo, a certificate of the relanding of the same, from the collector of the proper port ; on failure whereof, the bond shall be put in suit, and in every such suit, judgment shall be given against the defendant or defendants, unless proof shall be produced of such relanding, or of loss by sea, or other unavoidable accident."

It is contended, that this act means loss by sea, or loss by other unavoidable accident ; but this construction is contradicted by the punctuation of the statute. If it had been intended to have the construction contended for, it would have been pointed thus : unless proof shall be produced of such relanding or of loss, by sea or other unavoidable accident." The court can no more alter the punctuation of a statute than the words. To give it the construction contended for, is to make the legislature speak nonsense ; it would make them say the sea is an accident. We consider this point as settled by the case of *United States v. Hall and Worth*, at this term (*ante*, p. 171).

*³²⁰ *Jones*, contrà.—The statute enlarges the obligation of the bond. The officer is bound to take the bond exactly in the form prescribed by the statute. There is only one act which prescribes the form of the bond ; but there are several acts which modify its effect. The third embargo act has annexed a new meaning to the condition of the bond. A bond taken under a known law, has the meaning and effect declared by that law. The act contemplates two excuses, viz., loss by perils of the sea, and loss by superior force ; but at all events, there must be a loss. But in this case, there is not a sufficient averment of a necessity even of going into the Havana, and there is no averment of a loss. The detention at Havana, and not the injury by the winds and waves, is averred to be the reason why they could not comply with the condition of the bond.

If a vessel be driven by a storm upon the coast of an enemy, and there captured, it is not a loss by perils of the sea. *Greene v. Elmslie*, Peake Cas. 212. The remote cause is never stated as the cause of the loss. And an averment of loss by capture cannot be supported by evidence of a loss by perils of the sea. *Kulen Kemp v. Vigne*, 1 T. R. 304 ; *Matthie v. Potts*, 3 Bos. & Pul. 23 ; 1 T. R. 130.

The third section of the third embargo act (2 U. S. Stat. 474), requires more strict proof than had been before required. The legislature was competent to say what degree of proof should be required of a *bond fide* excuse. They have supposed that nothing but the loss of the thing itself could be satisfactory evidence of the impossibility of complying with the condition of the bond. This is also the true grammatical construction of the sentence. After saying, proof of relanding, or of loss by sea, the word "of" is omitted. If proof of other unavoidable accident was intended to be admitted *³²¹ as an excuse, in the same manner as proof of loss by sea, the language would have been, proof of relanding, or of loss by sea, or of other unavoidable accident. If proof of unavoidable accident was intended as an excuse, they would have said, or other unavoidable accident, which

Dourousseau v. United States.

should actually render it impossible to reland the goods in the United States.

But as the clause now stands, if our opponents are right in their construction, proof of unavoidable accident will be an excuse, although it be not such an accident as would necessarily render, or should actually have rendered, it impossible to comply with the condition of the bond, whether it produce loss, or not, and whether it prevented the relanding, or not. It does not appear by the plea, that the defendants did not make a great profit by the voyage.

E. Livingston, in reply.—We are entitled to the benefit of the exception of dangers of the seas, in the condition of the bond, and also to the benefit of the exception of unavoidable accident in the statute. The plea states as strong a case of necessity as that of the case of *United States v. Hall and Worth*, decided by this court, at this term. We have made out a clear case both under the exception of dangers of the seas, and under the provision of the statute, in case of unavoidable accident. No man can be bound to do an impossibility.

Insurance cases do not apply to the present; there, the contract enumerates a great number of risks, and courts and litigants employ themselves in classing losses under one or another of those risks. In every other kind of contract, the expression, "dangers of the seas," means every accident that can happen at sea. In a bill of lading, the master contracts to deliver the *goods at a certain place, the dangers of the seas excepted. Nobody [*322 ever supposed he would be liable, if the goods should be captured or seized by the superior force of public enemies. The case cited from Bunbury was upon a statute which required proof that the goods perished in the sea; but our statute has no such clause.

MARSHALL, Ch. J., delivered an opinion to the following effect:—The court considered many of the points in these cases while they had the case of *United States v. Hall and Worth* under consideration, and upon the present argument, I understand it to be the unanimous opinion of the court, that the law is for the plaintiffs in error, in all these cases. I cannot precisely say, what are the grounds of that opinion; I can only state the reasons which have prevailed in my own mind.

It is true, as contended on the part of the United States, that the legislature is competent to declare what evidence shall be received of the facts offered in excuse for a violation of the letter of a statute. I also agree with the counsel for the United States, that the words of the statute, "loss by sea or other unavoidable accident," mean loss by sea, or loss by other unavoidable accident. But the question is, what sort of loss is meant? It must be such a loss as necessarily prevents the party from complying with the condition of the bond. It is not necessary, that it should be an actual destruction of the property, but such a loss only as necessarily prevents the relanding of the goods.

This statute is not like that upon which the prosecution was founded in the case cited from Bunbury. Our statute does not require evidence that the goods have "perished in the sea." It only requires proof of such a loss, by an unavoidable accident, as prevents the *relanding of the cargo, [*323 according to the condition of the bond. When the property is cap-

Tyler v. Tuel.

tured, and taken away by the superior force of a foreign power, so as to prevent the relanding, it is lost, within the meaning of the statute, by an unavoidable accident, although the owner may have received a compensation for it.

JOHNSON, J.—I agree with the court, in the result of the opinion, but not altogether upon the grounds stated by the Chief Justice. If the act in question will admit of two constructions, that should be adopted, which is most consonant with the general principles of reason and justice. I cannot suppose, that the legislature meant to do an unjust or an unreasonable act. No man can be bound to do impossibilities. The legislature must be understood to mean, that the party should be excused, by showing the occurrence of such circumstances as rendered it impossible to perform the condition of the bond. To make his liability depend upon the mere point of ultimate loss or gain, would be unreasonable in the extreme.

LIVINGSTON, J.—I concur in the reversal of these judgments, but not in the construction which the Chief Justice puts upon the third section of the act of March 1808.

If the relanding of the cargo in the United States had been prevented by any unavoidable accident whatever, although the goods themselves were not lost, it would, in my opinion, have furnished a good defence to this suit. If the Spanish government had forced a sale of the property, and the proceeds had actually come to the hands of the owners, it would have made no difference. Loss by sea is one excuse; unavoidable accident, whether followed by loss, or not, is another.

*WASHINGTON and TODD, Justices, agreed in opinion with Judge *324] Livingston.

Judgment reversed.

TYLER and others v. TUEL.

Patents.

An assignee of part of a patent-right cannot maintain an action on the case, for a violation of the patent.¹

THIS was a case certified from the Circuit Court of the district of Vermont. Tyler and others sued as assignees of Benjamin Tyler, the original patentee of an improvement in grist-mills, which, he called the wry-fly, or side-wheel.

After a verdict for the plaintiffs, the judges of the court below, upon a motion in arrest of judgment, were divided in opinion upon the question, "whether the plaintiffs, by their own showing, are legal assignees to maintain this action?"

There were two counts in the declaration. The first set forth the substance of the statutes upon the subject of patents for useful discoveries, the facts necessary to entitle the patentee to a patent for his invention, and the patent itself, together with the specification, dated February 20th, 1800.

¹ But he could sue in equity. Ogle v. Ege, 4 W. C. C. 584. The assignee of a sectional interest may sue at law, under the act of 1836.

Tyler v. TueL.

The averment of the assignment of the patent-right to the plaintiffs was in these words : " And the plaintiffs further say, that the said Benjamin Tyler, afterwards, to wit, on the 15th day of May, in the year last aforesaid, at said Claremont, by his certain deed, of that date, by him signed, sealed, and to the plaintiffs, then and there, by the said Benjamin delivered, and ready to be shown to the court, did, in consideration of the sum of \$6000, to him, before that time, by the plaintiffs paid, grant, bargain, sell, assign *and set over to the plaintiffs, their executors, administrators and assigns, all the right, title and privilege in, unto and over the said [*325 improvement in the said patent described, and thereby vested in the said Benjamin, in any part of the United States, excepting in the counties of Chittenden, Addison, Rutland and Windham, in the state of Vermont."

The second count, omitting the recital of the statutes and of the patent, stated concisely the same facts. The averment of the assignment of the patent-right was as follows : " And the said Benjamin Tyler, afterwards, and before the expiration of the said fourteen years, to wit, at said Claremont, on the 15th day of May, in the year last aforesaid, by his certain deed, of that date, by him, then and there, signed, sealed, and to the plaintiffs delivered, assigned to the plaintiffs the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, in and throughout the United States, excepting in the counties of Chittenden, Addison, Rutland and Windham, in the state of Vermont, as fully and amply as by said letters-patent the said Benjamin Tyler was thereto entitled, and all his title and interest in and unto said improvement excepting as aforesaid."

Hubbard, for the defendant, contended, that the assignment, being of part of the patent-right only, was not such as would authorize the assignees to maintain an action on the statute. (1 U. S. Stat. 322, §§ 4, 5.) The fourth section of the act declares, "that it shall be lawful for any inventor, his executor or administrator, to assign the title and interest in the said invention at any time, and the assignee, having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assigns to any degree." The fifth section provides, "that if any person shall make, devise and use, or sell the thing so invented, the *exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators or assigns first obtained in writing, every person so offending shall forfeit and pay to the patentee a sum that shall be at least equal to three times the price for which the patentee has usually sold or licensed to other persons the use of the said invention ; which may be recovered in an action on the case founded on this act, in the circuit court of the United States, or any other court having competent jurisdiction." [*326

It is evident, from the whole purview of the statute, especially from the 4th, 5th, 6th and 10th sections, that no person can be considered as an assignee under the statute, who is not the assignee of the whole right of the original patentee.

Rodney, Attorney-General, contrâ.—Upon a motion in arrest of judgment, if the judges are divided, the motion fails, and the judgment must be

The Juliana.

entered of course. It must follow the verdict, unless sufficient cause be shown to the contrary. 1 Salk. 17; 1 Ld. Raym. 271; 3 Mod. 156.

If there can be no assignment but of the whole right, then the exception of particular counties is void; it being repugnant to the prior words and intention of the grant. So, if the jury find a fact inconsistent with a fact previously found, the latter fact shall be rejected. Cro. Car. 130; 3 East; 6 Bac. Abr. 381; Plowd. 564; 1 Bl. Com. 89; 2 Co. 83; 8 Ibid. 56; Dyer 351; 1 Co. 3; 1 Vent. 521; Cro. Eliz. 244. The whole passed, at law, by the deed of assignment. The exceptions are in the nature of equitable assignments.

On a subsequent day, THE COURT directed the following opinion to be certified to the circuit court for the district of Vermont, viz:—^{*327]} It is the opinion of the court, that the plaintiffs, by their own showing, are not legal assignees to maintain this action, in their own names, and that the judgment of the circuit court be arrested.

*The JULIANA.**The Schooner JULIANA v. UNITED STATES.**The ALLIGATOR.**The Ship ALLIGATOR v. UNITED STATES.**Embargo.*

It was no offence against the embargo law, to take goods out of one vessel and put them into another, in the port of Baltimore, unless it were with an intent to export them.¹

THESE were appeals from the sentence of the Circuit Court for the district of Maryland, affirming the sentence of the district court, which condemned the schooner Juliana, and the ship Alligator and cargo, for a supposed violation of the 3d section of the act of congress of the 9th of January 1808, entitled "an act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," by putting goods from the Juliana on board the Alligator.

The libel, in the case of the Juliana, stated, that on the first of January 1808, she, being a Swedish vessel, cleared from Baltimore for Port au Prince, having on board 100 barrels of herrings, which were on board when her master was notified of the embargo; that she proceeded on her voyage to her port of destination, but before she left Patapsco river, there were laden on board of her a complete cargo of merchandise, foreign and domestic, with which she proceeded, in prosecution of her said voyage, until the 1st of January 1808, when she was arrested by the officer of the custom house of the port of Baltimore, and brought back; after which, and while she was in that port, viz., the 11th of January 1808, sundry goods, described in the libel, were taken and removed from the Juliana and put on board the Alligator, ^{*328]} then lying in the port of *Baltimore, "contrary to the provisions of the statutes of the said United States, in such case made and provided, and with intent to violate the provisions of the said statutes, for which

¹ The Paulina, 7 Cr. 52.

The Rachel.

cause she was seized by the collector of that port as forfeited. The libel in the case of the Alligator was a copy of that against the Juliana.

The words of that part of the 3d section of the act of January 9th, 1808 (2 U. S. Stat. 453), upon which these libels were founded, are as follows : "And be it further enacted, that if any ship or vessel shall, during the continuance of the act to which this act is a supplement, depart from any port of the United States, without a clearance or permit ; or if any ship or vessel shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel, any goods, wares or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares, and merchandise shall be wholly forfeited."

Harper and Martin, for the appellants, contended, that the sentence ought to be reversed—

1. Because it appears from the libel, that if any goods were put on board the Alligator, it was after the Juliana had been seized and brought back, and while the Alligator was at the wharf, a perfect hulk, totally unfit to proceed on a voyage, and entirely passive as to any improper use made of her.

2. The libel does not charge that the goods put on board the Alligator were the same which were on board the Juliana, when she was seized and brought back.

3. It does not charge that the owner of the Alligator had any knowledge of, or concern in, the business.

4. The evidence is insufficient to prove any cause of condemnation.

*5. It is not averred, that the goods were put on board the Alligator, with intent to export them ; which is the offence contemplated [*329 by the act.

6. The libel does not allege that the seizure was made within the district of the seizing officer ; nor upon the water. It does not appear to be a case of admiralty jurisdiction.

The *Attorney-General*, on the next day, abandoned the causes as untenable.

Sentence reversed, and restitution ordered.

The RACHEL.

The Schooner RACHEL v. UNITED STATES.

Expiration of penal law.

No sentence of condemnation can be affirmed, if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States, before the expiration of the law.

This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made.

THIS was an appeal from the sentence of the district court of the United States for the district of Orleans, which condemned the schooner Rachel for having traded with certain prohibited ports of St. Domingo, contrary to the act of congress.

The sentence of condemnation was passed, and the vessel sold, and the

The Amiable Lucy.

proceeds paid over to the United States, while the act was in force. The act had since expired. It was a case within the principle decided at last term, in the case of *Yeaton and Young v. United States (The General Pinkney, 5 Cr. 281)*, but it having been made a question whether the sale and payment over of the money did not prevent the operation of that principle, and there being also a question of jurisdiction, the cause stood over to this term for consideration.

The general question of jurisdiction of that court having been settled at this term, in the case of *Sere and Laralde v. Pitot and others (post, p. 382)*, and the fact of the sale and payment over of the money being admitted—

*³³⁰ *Martin and P. B. Key*, for the claimants, prayed the court to direct that the proceeds should be paid over to the claimants. But—

THE COURT said, that it was a matter to be left to the consideration of the court below. This court will only make a general order for restitution of the property condemned.

The AMIABLE LUCY.

The Brigantine AMIABLE LUCY v. UNITED STATES.

Slave trade.

The act of congress of the 28th of February 1803, to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited, is not in force in the territory of Orleans.

ERROR to the District Court of the United States for the district of Orleans, to reverse the sentence of that court, which condemned the brigantine Lucy, for importing a slave from the West Indies, contrary to the act of congress of the 28th of February 1803 (2 U. S. Stat. 205), entitled "an act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited ;" by the first section of which it is enacted, that no master of a vessel, "or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state which by law has prohibited, or shall prohibit, the admission or importation of such negro," &c.

And by the second section, it is enacted, "that if any such negro or mulatto, or other person of color, shall be landed from on board any ship or vessel, in any of the ports or places aforesaid, or on the coast of any state prohibiting the admission or importation as aforesaid, the said ship or vessel," &c., "shall be forfeited to the United States."

*³³¹ By the 7th section of the act of March 26th, 1804, **"erecting Louisiana, into two territories, and providing for the temporary government thereof" (2 U. S. Stat. 285), it is enacted, that the above act of 28th of February 1803, "shall extend to, and have full force and effect in, the above-mentioned territories." And the 10th section of the same act (*Ibid. 286*), prohibits the importation of slaves into the territory of Orleans,

The Amiable Lucy.

from any place without the United States, under the penalty of \$300 ; and also prohibits, under the like penalty, the importation from the United States of any slave imported into the United States since the first of May 1798, and of all other slaves, except by a citizen of the United States removing into the territory for actual settlement, and being the *bond fide* owner of such slaves, at the time of such removal.

By the 4th section of the act of March 2d, 1805 (2 U. S. Stat. 322), entitled, "an act further providing for the government of the territory of Orleans," it is enacted, "that the laws in force in the said territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified or repealed by the legislature," by that act established. And the 8th section enacts, "that so much of an act, entitled, an act erecting Louisiana into two territories, and providing for the temporary government thereof, as is repugnant with this act, shall, from and after the first Monday of November next, be repealed ; and the residue of the said act shall continue in full force, until repealed, anything in the 16th section of the act to the contrary notwithstanding."

This act (March 2d, 1805) establishes a government for the territory of Orleans, similar to that before exercised in the Mississippi territory (1 U. S. Stat. 549), with a few exceptions. The fifth section declares, that the article of the ordinance of the old congress for the government of the territory north-west of the Ohio, which prohibits slavery, is excluded from all operation within the territory of Orleans. It was admitted, that the territorial legislature had *never passed any law prohibiting the importation of [*332 slaves.

It was contended by *Rodney*, Attorney-General, that as congress, by the act of the 26th of March 1804, prohibited the importation of slaves from foreign countries into the territory of Orleans, and as the same act expressly extends to the territory, the act of the 28th of February 1803, which forfeits the ship which imports a slave into a state where such importation is prohibited, the evident meaning and intention of congress was, to declare that the vessel should be forfeited which should import a slave into the territory of Orleans.

E. Livingston, contrà, contended, that inasmuch as the territorial legislature of Orleans had never prohibited such importation, the act of the 28th of February 1803, did not apply. If the territory is to be assimilated to a state, so as to bring the case within the spirit of the law, yet, there must have been a prohibition by the territorial legislature, to make it a parallel case.

And of that opinion was this COURT, the case having been submitted without argument.

Sentence reversed.

SERÈ and LARALDE v. PITOT and others.*Jurisdiction.—Citizenship.*

A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts.¹

The citizens of the territory of Orleans may sue and be sued in the district court of that territory, in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

ERROR to the District Court of the United States for the district of Orleans, in a suit in equity, in which Serè & Laralde were complainants, against Pitot and others, defendants.

The complainants stated, that they were aliens, and syndics of the creditors of the joint concern of Dumas & Janeau, Pierre Lavergne and Joseph Faurie ; that Faurie died insolvent ; that Dumas & Janeau were *also *333] insolvent, and made a surrender of all their effects to their creditors, and that Lavergne acknowledged himself to be unable to pay the debts of the joint concern ; that the joint concern, as well as the individual members, being insolvent, "application was made by their creditors to the superior court of the territory of Orleans, and such proceedings were thereupon had, that, according to the laws of the said territory, the complainants were, at a meeting of the creditors of the said partnership, duly nominated syndics for the said creditor, and, by the laws of the said territory, all the estate, rights and credits of the said partnership were vested in the complainants." They also stated that the defendants were citizens of the United States. The defendants pleaded to the jurisdiction, and the court below allowed the plea.

E. Livingston, for the plaintiffs in error, contended, 1. That the 11th section of the judiciary act of 1789 did not apply to those assignees to whom the *chooses in action* of an insolvent were transferred by operation of law, as in the case of executors and administrators. *Chappedelaine v. Dechenaux*, 4 Cr. 306 : and 2. That under the third article of the constitution of the United States, and the judiciary act of 1789, it was sufficient to aver one of the parties to be a citizen of the United States, generally, if the other party were an alien. It is to be presumed, that he was a citizen of some one of the states.

Harper, contrà.—The judiciary act is express in prohibiting a suit in the federal court by an assignee, if the suit could not have been maintained between the original parties. The expression is general, "or other *chose in action*," which comprehends the present case. By the constitution, if one party be an alien, the *other must be a citizen of one of the states ; *334] it is not sufficient that he be a citizen of one of the territories of the United States. The case of *Chappedelaine* was that of an administrator ; this is of a mere assignee.

Livingston, in reply.—The act of congress speaks of recovering the contents of a *chose in action*, evidently referring only to cases of individual assignments of particular *chooses in action*, not to a general assignment of all his effects by an insolvent.

¹ *s. r. Bradford v. Jenks*, 2 McLean, 130. Justice CHASE says, it is not easy to reconcile But in *Bushnel v. Kennedy*, 9 Wall. 303, Chief the opinion in *Serè v. Pitot* with the later cases.

Serè v. Pitot.

March 17th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows, viz :—This suit was brought in the court of the United States for the Orleans territory, by the plaintiffs, who are aliens, and syndics or assignees of a trading company composed of citizens of that territory, who have become insolvent. The defendants are citizens of the territory, and have pleaded to the jurisdiction of the court. Their plea was sustained, and the cause now comes on to be heard on a writ of error to that judgment.

Two objections are made to the jurisdiction of the district court. 1. That the suit is brought by the assignees of a *chose in action*, in a case where it could not have been prosecuted, if no assignment had been made. 2. That the district court cannot entertain jurisdiction, because the defendants are not citizens of any state.

The first objection rests on the 11th section of the judicial act, which declares "that no district or circuit court shall have cognisance of any suit to recover *the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such a court, to recover the said contents, if no assignment had been made." The plaintiffs are admitted to be the assignees of a *chose in action*; but it is contended, that they are not within the meaning of the provision which has been cited, because this is a suit for cash, bills and notes, generally, by persons to whom the law transfers them, and not by such an assignee as is contemplated in the judicial act. The words of the act are said to apply obviously to assignments made by the party himself, on an actual note, or other *chose in action*, assignable by the proprietor thereof, and that the word "contents" cannot, by any fair construction, be applied to accounts or unliquidated claims. Apprehensions, it is said, were entertained that fictitious assignments might be made to give jurisdiction to a federal court, and, to guard against this mischief, every case of an assignment by a party holding transferable paper, was excepted from the jurisdiction of the federal courts, unless the original holder might have sued in them.

Without doubt, assignable paper, being the *chose in action* most usually transferred, was in the mind of the legislature, when the law was framed; and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe, that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts, as to exclude the same person, when the assignee of a particular note. The term "other *chose in action*," is broad enough to comprehend either case; and the word "contents," is too ambiguous in its import, to restrain that general term. The "contents" of a note are the sum it shows to be due; *and the same may, without much violence to language, be said of an account.

The circumstance, that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made

Serè v. Pitot.

no exception in favor of assignments so made. It is still a suit to recover a *chose in action* in favor of an assignee, which suit could not have been prosecuted, if no assignment had been made; and is, therefore, within the very terms of the law. The case decided in 4 Cranch, was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term "assignees," and are, therefore, not within the words of the act. That case, therefore, is not deemed a full precedent for this.

It is the opinion of the court, that the plaintiffs had no right to maintain this suit in the district court, against a citizen of the Orleans territory, they being the assignees of persons who were also citizens of that territory.

It is of so much importance to the people of Orleans to decide on the second objection, that the court will proceed to consider that likewise. Whether the citizens of the territory of Orleans are to be considered as the citizens of a state, within the meaning of the constitution, is a question of some difficulty, which would be decided, should one of them sue in any of the circuit courts of the United States. The present inquiry is limited to a suit brought by or against a citizen of the territory, in the district court of Orleans.

The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares *that *337] "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.

The court possesses the same jurisdiction which was possessed by the court of Kentucky. In the court of Kentucky, a citizen of Kentucky may sue or be sued. But it is said, that this privilege is not imparted to a citizen of Orleans, because he is not a citizen of a state. But this objection is founded on the idea, that the constitution restrains congress from giving the court of the territory jurisdiction over a case brought by or against a citizen of the territory. This idea is most clearly not to be sustained, and, of consequence, that court must be considered as having such jurisdiction as congress intended to give it.

Let us inquire, what would be the jurisdiction of the court, on this restricted construction? It would have no jurisdiction over a suit brought by or against a citizen of the territory, although an alien, or a citizen of another state might be a party. It would have no jurisdiction over a suit brought by a citizen of one state, against a citizen of another state, because neither party would be a citizen of the "state" in which the court sat. Of what civil causes, then, between private individuals, would it have jurisdiction? Only of suits between an alien and a citizen of another state, who should be found in Orleans. Can this be presumed to have been the intention of the legislature in giving the territory a court possessing the same jurisdiction *338] and power with that of Kentucky. The principal motive for giving federal courts jurisdiction, is to secure aliens and citizens of other *states

Maryland Insurance Co. v. Ruden.

from local prejudices. Yet all who could be affected by them are, by this construction, excluded from those courts. There could scarcely ever be a civil action between individuals, of which the court could take cognisance, and if such a case should arise, it would be one in which no prejudice is to be apprehended.

It is the unanimous opinion of the court, that, by a fair construction of the act, the citizens of the territory of Orleans may sue and be sued in that court, in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

Judgment affirmed, with costs.

MARYLAND INSURANCE COMPANY v. RUDEN's administrator.

Marine insurance.—Abandonment.—Concealment.—Bill of lading.

What is reasonable time for abandonment, is a question for the jury to decide, under the direction of the court.¹

The operation of a concealment, on the policy, depends upon its materiality to the risk; and this materiality is a subject for the consideration of a jury.²

A bill of lading, stating the property to belong to A. and B., is not conclusive evidence, and does not estop A. from showing the property to belong to another.

ERROR to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of insurance upon the cargo of the brig Sally, at and from Surinam to New York. There was no warranty as to the character of the property.

Upon the trial below, the plaintiffs in error took three bills of exception; and the verdict and judgment being against them, they brought their writ of error.

The cause was argued by *Winder* and *Martin*, for the plaintiffs in error, and by *Harper*, for the defendant. The case being fully stated by the Chief Justice, in delivering the opinion of the court, it is deemed unnecessary to report the arguments of counsel.

March 17th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—*This case depends on the correctness of the circuit court in giving some opinions, and refusing others, to which exceptions have been taken. [*339]

It appears that, on the 22d of October, the assured received notice of the capture of the vessel insured, and that, on the 25th, he wrote a letter abandoning to the underwriters, which letter was received in course of the mail, and immediately acted upon. Some reasons were assigned by the plaintiff below, for not having abandoned more immediately after receiving notice of the capture, and the defendant below moved the court to instruct the jury, that the assured did not elect to abandon in reasonable time. To the refusal of the court to give this instruction, the first exception is taken.

It has been repeatedly declared by this court, that what is reasonable time for abandonment is a question compounded of fact and law, of which

¹ *Chesapeake Ins. Co. v. Stark*, *ante*, p. 268.

² *Livingston v. Maryland Ins. Co.*, *ante*, p. 274; *Clason v. Smith*, 3 W. C. C. 156.

Maryland Insurance Co. v. Ruden.

the jury must judge, under the direction of a court. It does not appear that the court below erred in refusing, in this case, to give the instruction required.

The insured was a subject of a belligerent power, but had resided four years in the United States. His letter, representing the risk, was laid before the jury, and a good deal of testimony was taken, to prove that a belligerent, not named in the representation, was interested in the cargo. Some counter-testimony was also introduced by the assured. Whereupon, the counsel for the underwriters moved the court to instruct the jury, that if they believed the facts stated by him, there was such a concealment as, in contemplation of law, vitiated the policy. This direction the court refused to give, but did direct the jury, that, if they should be of opinion, that any circumstances were stated by Ruden, or his agent, or that any circumstances were suppressed by either of them, which, in the opinion of the jury, would increase the risk, then the plaintiff cannot recover. To this opinion, an exception was taken.

It is well settled, that the operation of any concealment on the policy depends on its materiality to the *risk, and this court has decided, [340] that this materiality is a subject for the consideration of a jury. Consequently, the court below did right in leaving it to them.

The counsel for the underwriters then gave some very strong evidence, to prove that the property insured was not the sole property of the assured, but was property in which another person held a joint interest. Some counter-testimony was adduced ; on which the defendant below moved the court to direct the jury, to find that the property was not the sole property of Ruden, but the joint property of Ruden and another. This direction also the court refused to give, and did direct the jury, that it was their peculiar province to determine the fact, whether Ruden was the sole owner of the property, or not ; and to this opinion, an exception was taken.

It is contended by the plaintiffs in error, that the testimony offered by them, among which was the bill of lading, stating the property to belong to Ruden and another, was such as absolutely to conclude him, and estop him from denying that another was concerned in the cargo. The court is not of this opinion. The covering of property does not conclude the person interested, so as to estop him from proving the truth of the case. There is the less reason for that effect being given to these papers, in this case, because the letter to the underwriters indicated that the cargo might be shipped in the name of other persons.

If the assured was not absolutely estopped, the court did not err in permitting the jury to weigh his testimony. They had a right to weigh it, and to decide to whom the property belonged. If their verdict was against evidence, the only remedy was a new trial, to be granted by the court in which the verdict was found.

There is no error, and the judgment is to be affirmed, with costs.

INDEX

TO THE
MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

ABANDONMENT.

1. The agent, who makes insurance for his principal, has authority to abandon, without a formal letter of attorney. *Chesapeake Ins. Co. v. Stark*.....*268
2. The informality of a deed of cession is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the rights of either party. *Id.*
3. If the abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters.....*Id.*
4. A special verdict is defective, which does not find whether the abandonment was in reasonable time.....*Id.*
5. What is reasonable time of abandonment, is a question compounded of fact and law, which must be found by a jury under the direction of a court. *Id. ; Maryland Ins. Co. v. Ruden*.....*338
6. The right to abandon may be kept in suspense, by mutual consent. *Livingston v. Maryland Ins. Co.*.....*274

ACCIDENT.

1. To an action of debt for the penalty of an embargo bond, it is a good plea, under the act of congress of the 12th of March 1808, § 8, that the party was prevented from relanding the goods in the United States, by unavoidable accident. *Durousseau v. United States*.....*308

ADMINISTRATOR.

1. In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*,

can only plead what his intestate could have pleaded. *McKnight v. Craig's Administrators*.....*183

ADMIRALTY.

1. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. *Maryland Ins. Co. v. Woods*..*29
2. The British orders in council of the 11th of November 1807, did not prohibit a direct voyage from the United States to a colony of France. *King v. Delaware Ins. Co.*.....*71
3. A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute. *United States v. The Helen*.....*203
4. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence. *Marine Ins. Co. v. Hodgson*.....*208
5. No sentence of condemnation can be affirmed, if the law, under which the forfeiture accrued, has expired, although a condemnation and sale may have taken place, and the money paid over to the United States, before the expiration of the law. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made. *The Rachel v. United States*.....*329

AD QUOD DAMNUM.

1. An appeal lies to the supreme court, from an order of the circuit court of the district

INDEX.

- of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*. *Custis v. Georgetown and Alexandria Turnpike Co.*.....*232
 2. The circuit court for the district of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act, "to authorize the making of a turnpike road from Mason's Causey to Alexandria.".....*Id.*

AGENT.

1. An agent who makes insurance for his principal has authority to abandon, without a formal letter of attorney. *Chesapeake Ins. Co. v. Stark*.....*268
 2. After abandonment, the agent of the insured becomes the agent of the underwriters....*Id.*

ALEXANDRIA.

1. The separation of Alexandria from Virginia did not affect existing contracts between individuals. *Korn v. Mutual Assurance So.*.....*192
 2. The insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia.....*Id.*

ALIEN.

1. A certificate by a competent court, that an alien has taken the oath prescribed by the act respecting naturalization, raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution of the United States, &c. *Campbell v. Gordon*.....*176
 2. The oath of naturalization, when taken, confers the rights of a citizen.....*Id.*
 3. It is not necessary, that there should be an order of court admitting him to become a citizen.....*Id.*
 4. The children of persons duly naturalized before the 14th of April 1802, being under age at the time of the naturalization of their parent, were, if dwelling in the United States, on the 14th of April 1802, to be considered as citizens of the United States.....*Id.*

AMENDMENT.

1. The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned for error. *Marine Ins. Co. v. Hodgson*.....*206
 2. After a cause is remanded to the inferior

- court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer. *Id.*
 3. A fault in the declaration, which would have been sufficient ground to arrest the judgment, is fatal, upon a writ of error. *Slacum v. Pomeroy*.....*221
 4. This court will not direct the court below to allow the proceedings to be amended. *Sheehy v. Mandeville*.....*254

ANSWER.

1. The answer of a defendant is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant. *Field v. Holland*.....*9
 2. The answer of one defendant is evidence against other defendants claiming through him.....*Id.*
 3. The answer of a defendant, who is substantially a plaintiff, is not evidence against the other defendants.....*Id.*

ASSIGNMENT.

1. A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia. *Lewis v. Harwood*.....*82
 2. In an action, in Virginia, by the assignee of a negotiable promissory note, against the maker, the latter may set off a negotiable note of the assignor, which he held at the time of receiving notice of the assignment of his own note, although the note thus set off was not due at the time of the notice, but became due before the note upon which the suit was brought. *Stewart v. Anderson*.....*204
 3. The assignee of part of a patent-right cannot maintain an action on the case for a violation of the patent. *Tyler v. Tuel*..*324
 4. A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts. *Sere v. Pitot*.....*332

ATTACHMENT.

1. The marshal of the District of Columbia is bound to serve a *subpoena* in chancery, as soon as he reasonably can; and the service of such *subpoena*, in case of a chancery attachment in Virginia, will make the garnishee liable, if he pays away the money, after notice of the *subpoena*. *Kennedy v. Brent*.....*187

ATTORNEY.

See AGENT.

AUDITOR.

1. A report of auditors appointed by consent of parties, in a suit in equity, is not in the nature of an award by arbitrators, but may be set aside by the court, although neither fraud, corruption nor gross misconduct on the part of the auditors, be proved. *Field v. Holland*. *8
2. Without expressly revoking an order of reference to auditors, the court may direct an issue to be tried. *Id.*

BAR.

1. A promissory note given and received for, and in discharge of, an open account, is a bar to an action upon the open account, although the note be not paid. *Sheehy v. Mandeville*. *253
2. A several suit and judgment against one of two joint makers of a promissory note, is no bar to a joint action against both upon the same note. *Id.*
3. Infancy is a bar to an action by an owner against his supercargo, for breach of instructions; but not to an action of trover for the goods. *Vasse v. Smith*. *226

BILL OF EXCEPTIONS.

1. A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed. *Vasse v. Smith* *226

BILL OF EXCHANGE.

1. In an action by the indorsee against the indorser of a foreign bill of exchange, the defendant is liable for damages, according to the law of the place where the bill was indorsed. *Slacum v. Pomeroy* *221
2. The indorsement of a bill of exchange is a new and substantive contract. *Id.*
3. In an action of debt against the indorser of a bill of exchange, under the statute of Virginia, it is necessary that the declaration should aver notice of the protest for non-payment. *Id.*

BILL OF LADING.

1. A bill of lading is not conclusive evidence of property. *Maryland Ins. Co. v. Ruden*. *338

BLOCKADE.

1. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. *Maryland Ins. Co. v. Woods*. *29
2. *Quare?* Whether breach of blockade, by a vessel not warranted neutral, would discharge the underwriters? *Id.*
3. If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation. *Id.*
4. A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders of April 1804. *Id.*
5. She was not bound to make inquiry elsewhere than of the blockading force. *Id.*

BOND.

1. A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia. *Lewis v. Harwood*. *82
2. If a vessel be driven by stress of weather to the West Indies, and the cargo be there detained by the government of the place, this is such a casualty as comes within the exception of "dangers of the seas," in the condition of an embargo bond. *United States v. Hall*. *171
3. A bond, executed in pursuance of articles of agreement, may, in equity, be restrained by those articles. *Finley v. Lynn*. *238

BOUNDARIES.

1. A grant of an island, by name, in the Potowmack River, superadding the courses and distances of the lines thereof, which on resurvey are now found to exclude part of the island, will pass the whole island. *Lodge v. Lee*. *237

BRITISH PROPERTY.

See CONFISCATION.

CHANCERY.

1. The practice, in Kentucky, of calling a jury to ascertain the facts in chancery causes is not correct. *Massie v. Watts*. *148
2. A suit in chancery by one who has the prior equity, against him who has the eldest patent, is in its nature local, and if it be a mere

- question of title, must be tried in the district where the land lies; but if it be a case of contract, or trust or fraud, it is to be tried in the district where the defendant may be found.....*Id.*
 3. If an agent locate land for himself, which he ought to have located for his principal, he is in equity a trustee for his principal.....*Id.*

See ATTACHMENT: AUDITOR, 1, 2.

CITIZEN.

See ALIEN, 1, 2, 3, 4.

COLUMBIA, DISTRICT OF.

1. The separation of the district of Columbia from the original states did not affect existing contracts between individuals. *Korn v. Mutual Assurance Society*.....*192

CONCEALMENT.

1. The effect of a misrepresentation or concealment upon a policy, depends upon its materiality to the risk, which must be decided by a jury, under the direction of a court. *Livingston v. Maryland Ins. Co.*, *274; *Maryland Ins. Co. v. Ruden*....*338
 2. If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured, to take such papers, the non-disclosure of the fact that they would be on board, will vacate the policy. *Livingston v. Maryland Ins. Co.*.....*274

CONFISCATION.

1. A writ of error lies to the highest court of a state, in a case where the question is, whether a confiscation under the law of the state was complete, before the treaty of peace with Great Britain. *Smith v. Maryland*....*286
 2. By the confiscating acts of Maryland, the equitable interests of British subjects were confiscated, without office found, or entry, or other act done, although such equitable interests were not discovered, until long after the peace.....*Id.*

CONSTITUTION.

See CONTRACT, 1-5

CONTINUANCE.

1. The refusal of the court below to continue a cause, is no ground for a writ of error. *Marine Ins. Co. v. Hodgeson*..... *205

CONTRACT.

1. When a law is in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights. *Fletcher v. Peck*.....*88
 2. A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.....*Id.*
 3. A grant is a contract executed.....*Id.*
 4. A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.....*Id.*
 5. The court will not declare a law to be unconstitutional, unless the opposition between the constitution and the law be clear and plain.....*Id.*

CONVEYANCE.

See CONTRACT, 1-4.

COSTS.

1. The court below, upon a mandate on reversal of its judgment, may award execution for the costs of the appellant in that court. *Riddle v. Manderville**86
 2. In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court. *McKnight v. Craig*.....*184

COVENANT.

1. If the breach of covenant assigned be, that the state had no authority to sell and dispose of the land, it is not a good plea in bar, to say, that the governor was legally empowered to sell and convey the premises; although the facts stated in the plea, as inducement, are sufficient to justify a direct negative of the breach assigned. *Fletcher v. Peck*. .*87
 2. It is not necessary, that the breach of a covenant should be assigned in the very words of the covenant. It is sufficient, if it show a substantial breach.....*Id.*
 3. In an action of covenant on a policy under seal, all special matters of defence must be pleaded. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy. *Marine Ins. Co. v. Hodgeson*.*206

DAMAGES.

See BILL OF EXCHANGE, 1.

DANGER OF THE SEAS.

See BOND, 2.

DEBT.

See **BILL OF EXCHANGE**, 8.

DECLARATION.

See **BILL OF EXCHANGE**, 8.

DEPOSITIONS.

1. The depositions contained in the proceedings of a foreign court of admiralty, condemning a vessel, are not evidence, in an action upon the policy of insurance. *Marine Ins. Co. v. Hodgson*.....*207

DEVIATION.

1. If a vessel sail to a port within the policy with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation. *Maryland Ins. Co. v. Woods*.....*29

EJECTMENT.

See **BOUNDARIES**.

EMBARGO.

1. It was no offence against the embargo law, to take goods out of one vessel and put them into another, in the port of Baltimore, unless done with an intent to export them. *The Juliana v. United States*.....*327

See **ACCIDENT**, 1: **BOND**, 2.

ENTRY OF LAND.

See **KENTUCKY**.

EQUITY.

1. A court of equity may itself ascertain the facts, if the evidence enables it to do so, or may refer the question to a jury, or to auditors. *Field v. Holland*.....*9
2. After an issue ordered, a court of equity may proceed to a final decree, without trying the issue, or setting aside the order.....*Id.*
3. If neither the debtor nor creditor has made an application of the payments, the court will apply them to the debts for which the security is most precarious.....*Id.*
4. No writ of error or appeal lies to an interlocutory decree, dissolving an injunction. *Young v. Grundy*.....*51
5. A bond executed in pursuance of articles of agreement, may in equity be restrained by those articles. *Finley v. Lynn*.....*288

6. A complainant in equity may have relief even against the admissions of his bill....*Id.*

See **AUDITOR**, 1, 2: **CHANCERY**, 2-4: **EVIDENCE**, 2-4, 6.

ERROR.

1. No writ of error or appeal lies to an interlocutory decree, dissolving an injunction. *Young v. Grundy*.....*51
2. Error does not lie to the refusal of the court below to give leave to amend, or to grant a new trial, or to continue a cause. *Marine Ins. Co. v. Hodgson*.....*206
3. Amendments may be allowed by the court below, after judgment upon demurrer, affirmed in this court.....*Id.*
4. What would have been fatal in arrest of judgment, is fatal, upon a writ of error. *Slacum v. Pomeroy*.....*221
5. This court will not direct the court below to allow proceedings to be amended. *Sheehy v. Mandeville*.....*254
6. Error lies to the highest state court, in a case where the question is, whether a confiscation was complete before the British treaty. *Smith v. Maryland*.....*286

See **COSTS**, 1, 2.

EVIDENCE.

1. The right to freedom, under the act of Maryland, which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master "to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States," although such proof be required by the act. *Scott v. Ben*.....*3
2. The answer of a defendant in chancery is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant. *Field v. Holland*..*9
3. The answer of one defendant in chancery is evidence against other defendants claiming through him.....*Id.*
4. The plaintiff cannot avail himself of the answer of a defendant, who is substantially a plaintiff; it is not evidence against a co-defendant.....*Id.*
5. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. *Maryland Ins. Co. v. Woods*..*29
6. If an answer in chancery neither denies nor admits the allegations of the bill, they must be proved on the final hearing; but upon the

- question of dissolution of an injunction, they are to be taken as true. *Young v. Grundy*.....*51
 7. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy. *Marine Ins. Co. v. Hodgson*.....*206
 8. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence. It is a useless practice, to read the proceedings at length. The depositions stated in such proceedings are not evidence, in an action upon the policy of insurance.....*Id.*
 9. In an action upon a valued policy, it is not competent for the underwriters, to give parol evidence that the real value of the subject insured is different from that stated in the policy.....*Id.*
 10. A complainant in equity may have relief even against the admissions in his bill. *Finley v. Lynn*.....*238
 11. If foreign laws are not proved to have been in writing, as public edicts, they may be proved by parol. *Livingston v. Maryland Ins. Co.*.....*274
 12. A bill of lading is not conclusive evidence of property. *Maryland Ins. Co. v. Rudden*.....*286

FOREIGN LAWS.

See EVIDENCE, 11.

FOREIGN SENTENCE.

See EVIDENCE, 5, 8.

FORFEITURE.

1. No sentence of condemnation can be affirmed, if the law under which the forfeiture accrued has expired, although a condemnation and sale may have taken place, and the money paid over to the United States, before the expiration of the law. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made. *The Rache' v. United States*.....*329

FREEDOM.

See SLAVES, 1.

FRENCH COURTS.

1. The jurisdiction of the French courts as to seizures, is not confined to seizures made within two leagues of the coast. *Hudson v. Guestier*.....*281

GEORGIA.

1. The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits. *Fletcher v. Peck*.....*87
 2. The king's proclamation in 1763 did not alter the boundaries of Georgia.....*Id.*
 3. The nature of the Indian title is not such as to be absolutely repugnant to seisin in fee on the part of the state.....*Id.*

GRANT.

1. A grant is a contract executed. *Fletcher v. Peck*.....*89

See BOUNDARIES.

HABEAS CORPUS.

1. The writ of *habeas corpus ad subjiciendum*, does not lie to bring up a person confined in the prison-bounds upon a *ca. sa.* issued in a civil suit. *In re Wilson*.....*52

INDIAN TITLE.

See GEORGIA, 3.

INDORSEMENT.

See BILL OF EXCHANGE, 1, 2, 3.

INFANCY.

1. Infancy is a bar to an action by an owner against his supercargo, for breach of instructions, but not to an action of trover for the goods. Still, however, infancy may be given in evidence upon the plea of not guilty, in trover; not as a bar, but to show the nature of the act which is supposed to be a conversion. *Vasse v. Smith*.....*226
 2. An infant is liable in trover, although the goods were delivered to him under a contract, and although they were not actually converted to his own use.....*Id.*

INJUNCTION.

1. No writ of error or appeal lies to an interlocutory decree, dissolving an injunction. *Young v. Grundy*.....*51
 2. Upon a question of dissolution of an injunction, the allegations of the bill are to be taken as true, unless denied by the answer..*Id.*

INQUISITION.

1. The circuit court of the district of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act "to

authorize the making of a turnpike road from Mason's causey to Alexandria. *Custiss v. Georgetown and Alexandria Turnpike Co.*.....*233

INSOLVENT.

See ASSIGNMENT, 4.

INSURANCE.

1. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of the violation of the warranty. *Maryland Ins. Co. v. Woods*.....*29
2. *Quare?* Whether breach of blockade by a vessel not warranted neutral, would discharge the underwriters?.....*Id.*
3. If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation.*Id.*
4. A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders in council, of April 1804. She was not bound to make inquiry elsewhere than of the blockading force.*Id.*
5. The questions whether the voyage be broken up, and whether the master was justified in returning, are questions of law, and the finding thereupon by a jury, is not to be regarded by the court. *King v. Delaware Ins. Co.*.....*71
6. The British orders in council, of the 11th of November 1807, did not prohibit a direct voyage from the United States to a colony of France*Id.*
7. If, from fear, founded on misrepresentation, the voyage be broken up, the underwriters are not liable.*Id.*
8. An insurance upon buildings in Alexandria did not cease, by the separation of Alexandria from Virginia, although the society could only insure houses in Virginia. *Korn v. Mutual Assurance Society*.....*192
9. The obligation of the assured to contribute does not cease, in consequence of his forfeiture of his own insurance, by his own neglect.*Id.*
10. All the members of the society are bound by the act of the majority.*Id.*
11. No member of the society can divest himself of his obligations as such, but according to the rules of the society.*Id.*
12. The additional premium upon a re-valuation, under the rules of the society, is only upon the excess. *Atkinson v. Mutual Assurance Society*.....*202
13. In an action of covenant on a policy under seal, all special matter of defence must be pleaded. *Marine Ins. Co. v. Hodgson* ..*206
14. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy.*Id.*
15. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence.*Id.*
16. The depositions stated in the proceedings of the court of admiralty are not evidence, in an action upon the policy.*Id.*
17. In an action upon a valued policy, it is not competent for the underwriters to give parol evidence, that the real value of the subject insured is different from that stated in the policy.*Id.*
18. The agent who makes insurance for his principal has authority to abandon, without a formal letter of attorney. *Chesapeake Ins. Co. v. Stark*.....*268
19. The informality of a deed of cession is unimportant, because, if the abandonment be unexceptionable, the property vests immediately in the underwriters, and the deed is not essential to the right of either party.*Id.*
20. If an abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters.*Id.*
21. A special verdict is defective, which does not find whether an abandonment was in reasonable time.*Id.*
22. What is reasonable time of abandonment, is a question compounded of fact and law, which must be found by a jury, under the direction of the court. *Id. ; Maryland Ins. Co. v. Ruden*.*338
23. If the interest of one joint-owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality, if the other joint-owner, whose interest is not insured, be a belligerent. *Livingston v. Maryland Ins. Co.*.....*274
24. The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.*Id.*
25. The effect of a misrepresentation or concealment upon a policy, depends upon its materiality to the risk, which must be decided by a jury, under the direction of a court. *Id. ; Maryland Ins. Co. v. Ruden*.*338
26. The right to abandon may be kept in suspense by mutual consent. *Livingston v. Maryland Ins. Co.*.....*274
27. If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact

that they would be on board, will vacate the policy.....*Id.*

JOINT PARTNERS.

1. A several suit and judgment against one of two joint makers of a promissory note, is no bar to a joint action against both, upon the same note. *Sheehy v. Mandeville*....*264
2. The whole of a joint note is not merged in a judgment against one of the makers, on his individual *assumption*; but the other may be charged in a subsequent joint action, if he plead severally.....*Id.*

JUDGMENT.

1. In Virginia, if the defendant die after an interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *McKnight v. Craig's Adm'r.**183

See JOINT PARTNERS, 1, 2.

JURISDICTION.

1. A suit in chancery, by one who has the prior equity, against him who has the eldest patent, is in its nature local; and if it be a mere question of title, must be tried in the district where the land lies. *Massee v. Watts*....*148
2. But if it be a case of contract, or trust, or fraud, it is to be tried in the district where the defendant may be found.....*Id.*
3. An appeal lies to the supreme court, from an order of the circuit court of the district of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*. *Custis v. Georgetown and Alexandria Turnpike Co.*.....*233
4. The circuit court of the district of Columbia has no jurisdiction, upon motion, to quash an inquisition taken under the act "to authorize the making of a turnpike road from Mason's causey to Alexandria."....*Id.*
5. The jurisdiction of the court below cannot be questioned, after the cause is sent back by mandate. *Skillern v. May*.....*267
6. The jurisdiction of the French courts, as to seizures, is not confined to seizures made within two leagues of the coast. *Hudson v. Guestier*.....*281
7. A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations. *Id.*
8. A writ of error lies to the highest court of a state, in a case where the question is, whether the confiscation of British property was complete, before the British treaty. *Smith v. Maryland*.....*286
9. The appellate powers of the supreme court

of the United States are given by the constitution; but they are limited and regulated by the judiciary act, and other acts passed by congress on the subject. *Durousseau v. United States*.....*308

10. This court has appellate jurisdiction of decisions in the district courts of Kentucky, Ohio, Tennessee and Orleans, even in causes properly cognisable by the district courts of the United States.....*Id.*
11. A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts. *Sere v. Pitot*.....*332
12. The citizens of the territory of Orleans may sue and be sued in the district court of that territory, in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.. ..*Id.*

JURY.

See CHANCERY, 1 : INSURANCE, 5, 21, 22, 25.

KENTUCKY.

1. If, by any reasonable construction of an entry of a warrant to survey land, it can be supported, the court will support it. *Massee v. Watts*.....*148
2. When a given quantity of land is to be laid off on a given base, it must be included within four lines, forming a square, as nearly as may be, unless that form be repugnant to the entry.....*Id.*
3. If the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location, by the application of certain principles, they will so complete it.....*Id.*
4. If a location have certain material calls, sufficient to support it, and to describe the land, other calls, less material, and incompatible with the essential calls of the entry, may be discarded.....*Id.*
5. The rectangular figure is to be preserved, if possible.....*Id.*

See CHANCERY, 1.

LANDS.

See BOUNDARIES: GEORGIA, 1-3: KENTUCKY.

LAW.

1. The court will not declare a law to be unconstitutional, unless the opposition between the constitution and the law be clear and plain. *Fletcher v. Peck*.....*87
2. In a contest between two individuals, claim-

- ing under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law. *Id.*
8. When a law is, in its nature, a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights. *Id.*
4. A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States. *Id.*
5. A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute. *United States v. The Helen*. *208
6. If foreign laws be not proved to be in writing, as public edicts, they may be proved by parol. *Livingston v. Maryland Ins. Co.* *274
7. No sentence of condemnation can be affirmed, if the law under which the forfeiture accrued has expired, although a condemnation and sale may have taken place, and the money paid over to the United States, before the expiration of the law. *The Rachel v. United States*. *329

See INSURANCE, 5, 21, 22, 25.

LAW OF NATIONS.

1. A seizure beyond the territorial jurisdiction, for breach of municipal regulation, is warranted by the law of nations. *Hudson v. Guestier*. *281

LEGISLATURE.

1. A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state. *Fletcher v. Peck*. *87

See GEORGIA, 1: LAW, 2-5.

LOCATION.

See BOUNDARIES: KENTUCKY.

MANDATE.

See COSTS, 1: JURISDICTION, 5.

MARSHAL.

See ATTACHMENT.

MARYLAND.

See CONFISSCATION, 2: JURISDICTION, 8: SALES: SLAVES, 1.

MISREPRESENTATION.

See CONCEALMENT, 1, 2.

MUNICIPAL LAW.

See LAW OF NATIONS.

NATURALIZATION.

See ALIEN, 1-4.

NEUTRALITY.

See INSURANCE, 1, 28, 24.

NEW ORLEANS.

See JURISDICTION, 10, 12: SLAVES, 2.

NEW TRIAL.

1. The refusal of the court below to grant a new trial is not a ground of error. *Marine Ins. Co. v. Hodgson*. *208
2. When the reversal is in favor of the defendant, upon a bill of exceptions, a new trial must be awarded by the court below. *Hudson v. Guestier*. *281

ORDERS IN COUNCIL.

See ADMIRALTY, 2: INSURANCE, 4.

ORLEANS.

See JURISDICTION, 10, 12: SLAVES, 2.

PARTNERS.

See JOINT PARTNERS, 1, 2.

PATENT.

See CHANCERY, 2.

PATENT-RIGHT.

1. The assignee of part of a patent-right cannot maintain an action on the case for a violation of the patent. *Tyler v. Tuel*. *224

INDEX.

PAYMENT.

1. If neither the debtor, nor the creditor has made an application of the payments, the court will apply them to the debts for which the security is most precarious. *Field v. Holland*.....*9
2. A promissory note given and received for and in discharge of an open account, is a bar to an action upon the open account, although the note be not paid. *Sheehy v. Mandeville*.....*254

PLEADING.

1. In Virginia, if the defendant die, after interlocutory judgment, and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *McKnight v. Craig's Administrator*.....*183

See ACCIDENT: COVENANT, 1-3 : PAYMENT, 2 : PRACTICE, 12.

PLENE ADMINISTRAVIT.

1. In Virginia, if a defendant die after office judgment, his administrator, upon *scire facias*, cannot plead *plene administravit*. *McKnight v. Craig's Administrator*.....*184

PRACTICE.

1. A report of auditors may be set aside, although neither fraud, corruption, partiality, nor gross misconduct on the part of the auditors be proved. *Field v. Holland*.....*8
2. Without revoking an order of reference to auditors, the court may direct an issue to be tried.....*Id.*
3. A court of equity may itself ascertain the facts, if the evidence enable it to do so, or may refer the question to a jury, or to auditors. After an issue ordered, a court of equity may proceed to a final decree, without trying the issue or setting aside the order.....*Id.*
4. The writ of *habeas corpus ad subjiciendum* does not lie, to bring up a person confined in the prison-bounds upon a *ca. sa.* issued in a civil suit. *Ex parte Wilson*.....*52
5. The court below, upon a mandate, on reversal of its judgment, may award execution for the costs of the appellant, in that court. *Riddle v. Mandeville*.....*86
6. In Virginia, if the defendant die after interlocutory judgment, and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *McKnight v. Craig's Administrator*.....*183

7. In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment, with the costs of that court.....*Id.*
8. The refusal of the court below to allow an amendment, or to grant a new trial, or to continue a cause, cannot be assigned for error. *Marine Ins. Co. v. Hodgson*.....*206
9. The court below may allow amendments, after judgment upon demurrer, affirmed in this court.....*Id.*
10. In an action of covenant upon a policy under seal, all special matters of defence must be pleaded. Under the plea of covenants performed, the defendant cannot give evidence which goes to invalidate the policy.....*Id.*
11. In order to prove the condemnation of a vessel, it is only necessary to produce the libel and sentence. It is an irregular practice, to read the proceedings at length.....*Id.*
12. In debt, on a bill of exchange, under the statute of Virginia, it is necessary in the declaration, to aver notice of the protest for non-payment. *Slacum v. Pomeroy*.....*221
13. What is fatal on motion to arrest judgment, is fatal on a writ of error.....*Id.*
14. This court will not direct the court below to allow the proceedings to be amended. *Sheehy v. Mandeville*.....*254
15. It is too late to question the jurisdiction of the court below, after the cause is sent back, with a mandate to cause the decree of this court to be executed. *Skillern v. May*..*267
16. A special verdict is defective, which does not find whether an abandonment was in reasonable time. *Chesapeake Ins. Co. v. Stark*.....*268
17. When the reversal is in favor of the defendant, upon a bill of exceptions, a new trial must be awarded by the court below. *Hudson v. Guestier*.....*281

See CHANCERY, 2, 3 : COVENANT, 1, 2, 3.

PROMISSORY NOTE.

See ASSIGNMENT, 2 : JOINT PARTNERS, 1, 2 : PAYMENT, 2.

PROCESS.

See ATTACHMENT.

REASONABLE TIME.

1. What is reasonable time of abandonment, is a question compounded of fact and law, which must be found by a jury, under the direction of the court. *Chesapeake Ins. Co. v. Stark*, *268. *Maryland Ins. Co. v. Rudden*.....*888

SALE.

1. The act of assembly of Maryland which authorized the commissioners of the city of Washington to resell lots, for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is exhausted. *O'Neal v. Thornton*.....*53
2. By selling and conveying the property to a third purchaser, the commissioners preclude themselves from setting up the second sale, and the second purchaser, by making this defence, affirms the title of the third purchaser.....*Id.*

SEIZURE.

See ADMIRALTY, 8.

SENTENCE.

See ADMIRALTY, 5: EVIDENCE, 5.

SET-OFF.

See ASSIGNMENT, 2.

SLAVES.

1. The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master to "prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States," although such proof be required by the act. *Scott v. Ben*.....*8
2. The act of congress of the 28th of February 1808, respecting the importation of slaves, is not in force in the territory of Orleans. *The Amiable Lucy v. United States*.....*330

TREATY, BRITISH.

See CONFISCATION, 2: JURISDICTION, 8.

TROVER.

1. Infancy is not a bar to an action of trover. *Vasse v. Smith*.....*226

See INFANCY, 2.

TURNPIKE ROAD.

See INQUISITION: JURISDICTION, 8, 4.

USURY.

1. If an agent, who has, by permission of his principal, sold eight per cent. stock, apply the money to his own use, and, being pressed for payment, give a mortgage to secure the repayment of the amount of the stock with eight per cent. interest thereon, it is usury. *Debutts v. Bacon*.....*252

VERDICT.

1. A special verdict is defective, which does not find whether an abandonment was in reasonable time. *Chesapeake Ins. Co. v. Stark*. *268

VIRGINIA.

See ASSIGNMENT, 1, 2: ATTACHMENT: BILL OF EXCHANGE, 8: INSURANCE, 8-12: PLEADING, 2.

VOYAGE.

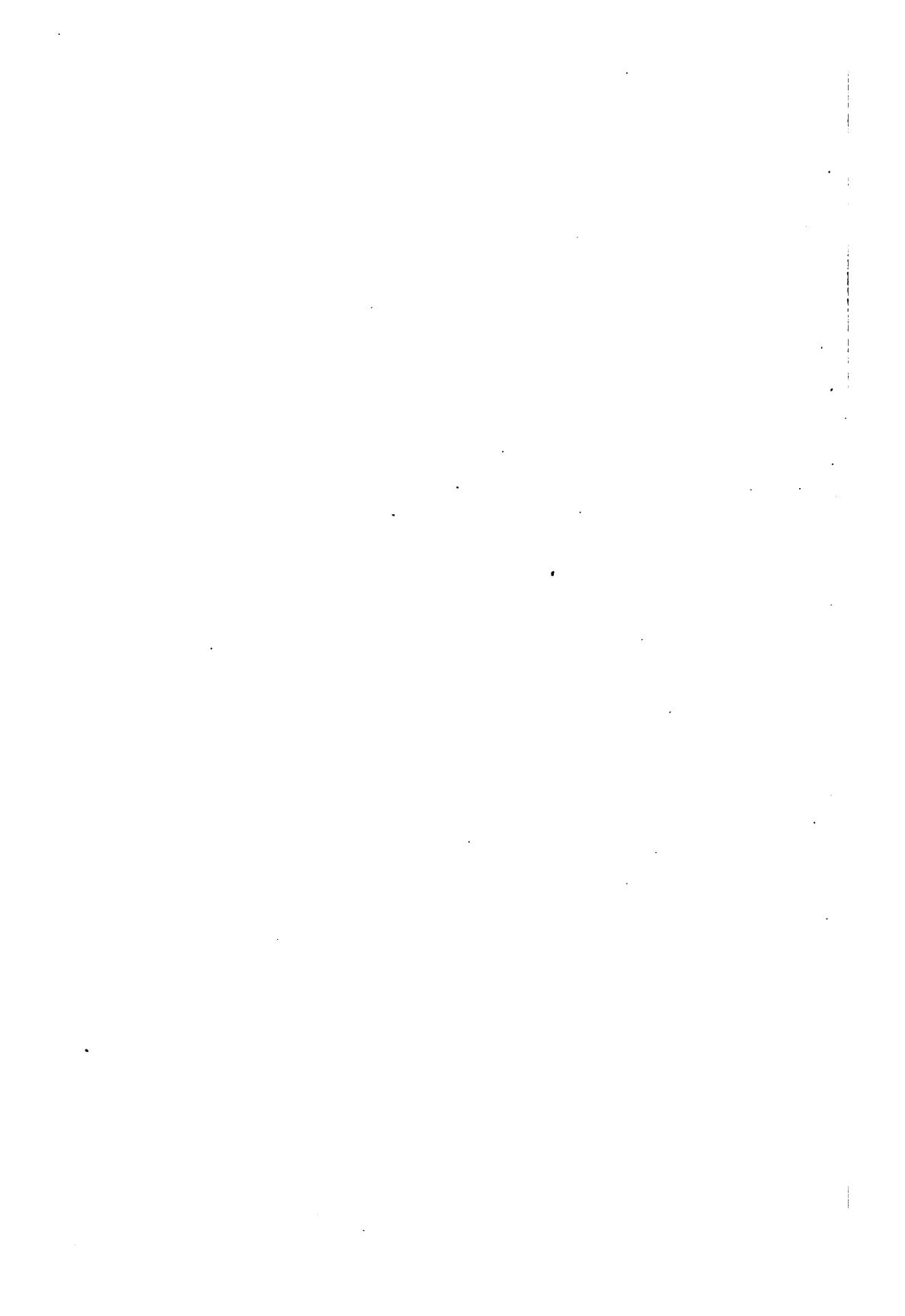
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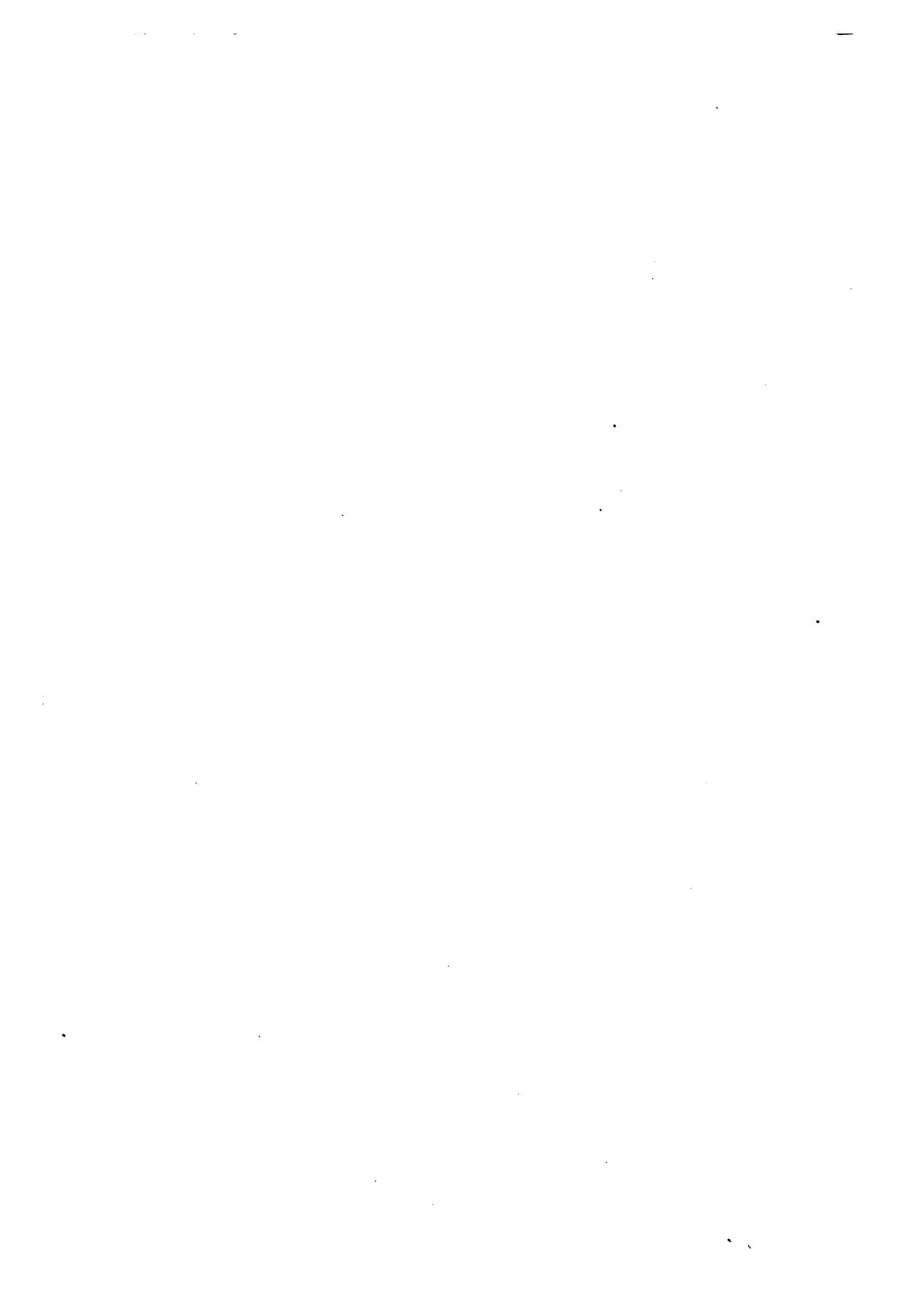
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WARRANTY.

See INSURANCE, 23, 24.











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